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No. 508

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**IN THE
SUPREME COURT
OF THE UNITED STATES**

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens
of the State of Colorado, taxpayers and electors therein, for
themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLO-
RADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLO-
RADO, HOMER BEDFORD AS TREASURER OF THE STATE OF
COLORADO, AND BYRON ANDERSON, AS SECRETARY OF STATE
OF THE STATE OF COLORADO,

Appellees.

**JURISDICTIONAL STATEMENT
AND APPENDICES**

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JURISDICTIONAL STATEMENT

Come now the Appellants above named, by their
counsel, and, under and in pursuance of Rule 15 of the
Rules of the Supreme Court make the following Jurisdic-
tional Statement.

1(a). This Appeal arises from and upon the Judg-
ment of the United States District Court for the District
of Colorado, sitting as a Court of three judges properly
convoked under the statutes in such cases applicable, in
its consolidated actions, being *Archie L. Lisco, et al. vs.*
John Love, et al., No. 7501, and *William E. Myrick, et al.*
vs. The Forty-Fourth General Assembly of the State of

Colorado, et al. No. 7637, which opinion and judgment were rendered and entered July 16, 1963, and which is not yet reported. Theretofore, on August 10, 1962, the same Court of three judges, in the same action, had rendered a Memorandum Opinion, which appears reported in 208 F. Supp. 471, under the title *Lisco vs. McNichols*. That Memorandum Opinion appears in Appendix A, herein, after, and the Opinion of the Court, which constitutes as well its findings and conclusions, together with the dissenting Opinion of Judge Doyle, appear hereinafter as Appendix B and B(1), respectively.

1(b). The grounds upon which the jurisdiction of this Honorable Court is invoked are as follows:

I. This is a proceeding on appeal from a final judgment of a three-judge Court, involving a denial of injunctive and other equitable relief with reference to the alleged unconstitutionality of Statutes and a Constitutional provision of the State of Colorado, and the appeal is taken under and in pursuance of Section 1253, 28 USCA, as follows:

"#1253. Direct appeals from decisions of three-judge courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The action is one which directly involves the question of legislative apportionment and the constitutional validity, under the Fourteenth Amendment to the Consti-

tution of the United States, of the Constitution of the State of Colorado, as it makes provisions for that apportionment, and the statutes of the State of Colorado relating thereto. A constitutional provision of the State of Colorado, and statutes enacted pursuant thereto, existing from the time of Statehood to the year 1962, required reapportionment after each state census and after each decennial federal census. Essentially no such apportionment was had, a gross distortion in apportionment developed, and the existing statutes were declared by the three-judge Court to be unconstitutional, in the Memorandum Opinion (Appendix A) above referred. Thereafter, the Constitution was amended, with the purpose of observing the rule of representation by population as concerns the House of Representatives, but removing the Senate entirely from that basis of selection, and providing for its election from perpetually frozen districts, now having a representational distortion in many cases approximating 4 to 1, and perpetually freed from the requirement of apportionment on a population basis.

The matters presented for determination are directly related to the questions presented in some six sets of proceedings in which jurisdiction was assumed by the Supreme Court during October term, 1962. The questions are fundamental questions under the equal protection and due process provisions of the Fourteenth Amendment ultimately resolvable only by action of the Supreme Court of the United States. In essence, the question involves a determination whether the populace of any state, by vote and alteration of a State constitution, may deprive other and non-consenting portions of the population of fundamental rights of suffrage and representation claimed by

them as citizens of the United States under the Fourteenth Amendment.

The time of appeal is submitted to be governed by Title 28, Section 2101, USCA:

"#2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment, or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

•••••

II. Applicable dates of proceedings in the District Court of the United States are as follows:

1. The initial Memorandum opinion of the Court was issued August 10, 1962, and appears on pages 31 and 354 of the Record. (Appendix A)
2. Thereafter, further pleadings and further trial thereon having been had, there was entered on July 16,

1963, a Memorandum Opinion and Order signed by Hon. Jean S. Breitenstein, United States Circuit Judge, Tenth Circuit, assigned; and Hon. Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado. That opinion appears at page 153 of the record. (Appendix B)

3. Concurrently, and on July 16, 1963, there was filed a dissenting opinion by Hon. William E. Doyle, Judge of the United States District Court for the District of Colorado. That dissenting opinion appears at page 191. (Appendix B(1))

4. Orders of Dismissal were entered on the same date, in pursuance of the majority opinion, and appear in the record on pages 205 and 206.

5. On August 1, 1963, there was filed by the Plaintiff (here appellant) Andres Lucas a Notice of Appeal to the Supreme Court of the United States, with return of service endorsed, appearing at page 387 of the record.

6. On August, 1963, there was filed by the Plaintiff (here appellant) Archie L. Lisco a Notice of Direct Appeal to the Supreme Court of the United States, appearing at page 397.

6. On September 5, 1963, the Clerk of the United States District Court transmitted to the Clerk of the Supreme Court of the United States the record in the within matters, as designed in the Notices of Appeal and in a Counterdesignation of Record.

III. It is believed and submitted that jurisdiction of the appeal is conferred upon this Court by Title 28 USCA,

#1253, and by #2101, Title 28 USCA, each quoted herein and immediately above.

IV. Cases believed to sustain the jurisdiction of this Court are as follows:

The problems presented in the instant appeal are essentially problems of equal protection of the laws, and of due process, under the Fourteenth Amendment to the Constitution of the United States, and as required to be embodied in the Constitution of Colorado, by virtue of the Enabling Act in pursuance of which that State Constitution was authorized to be adopted. The jurisdictional arguments are essentially discussed in *Baker vs. Carr*, 369 U.S. 186, 82 S.Ct. 691, and as repeated at length in *Gray vs. Sanders*, 83 S.Ct. 801, U.S.

Subsequent to the decision in *Baker vs. Carr*, supra, numerous cases have arisen in the State Courts of ultimate jurisdiction and in the United States District Courts of many jurisdictions, in which three-judge Courts have been convoked to determine rather similar questions. In the October term, 1962, this Court accepted jurisdiction in several sets of such cases, some four sets involving directly the question of legislative apportionment, and two other sets of cases involving the kindred question of Congressional districting. Those cases, pending in Supreme Court of the United States, are as follows:

1. Relating to Legislative Apportionment:

(a). ALABAMA: *Sims vs. Frink*, reported in 205 F. Supp. 245, 208 F. Supp. 431 (M.D. Ala., 1962), and pending in the Supreme Court as *Reynolds vs. Sims*, No.

508, *Van vs. Frink*, No. 540, and *McConnell vs. Frink*, No. 610, all October term, 1962.

(b). MARYLAND: *Maryland Committee For Fair Representation vs. Tawes*, reported in 228 Md. 412, 180 A.2d 656; 229 Md. 317, 182 A.2d 877; and 229 Md. 406, 184 A.2d 715, and pending in the Supreme Court as a single action, No. 554, October Term, 1962.

(c). NEW YORK: *W. M. C. A. vs. Simon*, reported in 202 F. Supp. 741 (S.D.N.Y., 1962); 270 U.S. 190 (1962); and 208 F. Supp. 368 (S.D.N.Y., 1962), and pending in the Supreme Court as a single action, No. 460, October Term, 1962.

(d). VIRGINIA: *Mann vs. Davis*, 213 F. Supp. 577 (E.D.VA., 1962), and pending in the Supreme Court as a single action, No. 797, October Term, 1962.

2. Relating to Congressional Districting:

(a). GEORGIA: *Wesberry vs. Vandiver (Wesberry vs. Sanders)*, 206 F. Supp. 276 (N.D. Ga., 1962), pending in the Supreme Court as No. 507, October Term, 1962.

(b). NEW YORK: *Wright vs. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y., 1962), pending in the Supreme Court as Docket No. 950, October Term, 1962.

V. Several provisions of the Constitution of the State of Colorado, and several sections of its Statutes, are pertinent to the within matter:

1. Article V, Sections 45, 46, and 47 are basic to the

present controversy. They are found in Volume I, 1953, Colorado Revised Statutes, on page 307, as follows:

"Section 45. Census.—The general assembly shall provide by law for an enumeration of the inhabitants of the state, in the year of our Lord 1885, and every tenth year thereafter; and at the session next following such enumeration, and also at the session next following an enumeration made by authority of the United States, shall revise and adjust the apportionment for Senators and Representatives, on the basis of such enumeration according to ratios to be fixed by law.

"Section 46. Number of members of general assembly.—The senate shall consist of not more than thirty-five and the house of not more than sixty-five members.

"Section 47. Senatorial and representative districts.—Senatorial and representative districts may be altered from time to time, as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the district as compact as may be. No county shall be divided in the formation of a senatorial or representative district."

2. Those provisions of the Colorado Constitution purportedly have been amended by an Amendment, commonly referred to as Amendment No. 7, placed on the ballot at the elections of November 6, 1962, adopted at that election, but not yet officially published in the statutes or supplements of the State of Colorado. The Amendment text is set out in the Supplemental Complaint, paragraph

4 (Record, page 372), and is admitted to be correctly so set out. The amendment is as follows:

"AN ACT TO AMEND ARTICLE V OF THE STATE CONSTITUTION PROVIDING FOR THE APPORTIONMENT OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY AND PROVIDING FOR SENATORIAL DISTRICTS AND REPRESENTATIVE DISTRICTS.

"SECTION 1. Sections 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47, and 48 of Article V are adopted, to read as follows:

"Section 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

"Section 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

"Section 47. SENATE. The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now

provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson, and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder, and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

“Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to, conform to the requirements of Section 45, 46, and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be provided by law.

“The ballot title and submission clause to the pro-

posed initiative amendment to the constitution petitioned for herein as designated and fixed by the Secretary of State, Attorney General and Report of the Supreme Court is as follows, to-wit:

“AN ACT TO AMEND ARTICLE V OF THE STATE CONSTITUTION PROVIDING FOR A SENATE OF 39 MEMBERS AND A HOUSE OF 65 MEMBERS; PROVIDES FOR 65 REPRESENTATIVE DISTRICTS TO BE SUBSTANTIALLY EQUAL IN POPULATION; FOR SENATORIAL DISTRICTS APPORTIONING SENATORS AS NOW PROVIDED BY LAW, AND ONE ADDITIONAL SENATOR IS APPORTIONED TO ADAMS, ARAPAHOE, BOULDER AND JEFFERSON COUNTIES; ELBERT COUNTY BEING DETACHED FROM ARAPAHOE COUNTY AND ATTACHED TO A DISTRICT WITH ADJOINING COUNTIES; PROVIDES FOR SENATORIAL DISTRICTS OF SUBSTANTIALLY EQUAL POPULATION WITHIN COUNTIES WITH MORE THAN ONE SENATOR; FOR REVISION OF DISTRICTS BY THE GENERAL ASSEMBLY IN 1963, AND AFTER EACH DECENNIAL CENSUS THEREAFTER, UNDER PENALTY OF LOSS OF COMPENSATION AND ELIGIBILITY OF MEMBERS TO SUCCEED THEMSELVES IN OFFICE.”

3. The statutory provision referred to in the said Amendment, Section 63-1-3, 1953 Colorado Revised Statutes, appears in Chapter 63, Article I, 1953 CRS, in Volume 3, page 728. The entire Chapter 63 is pertinent in this matter, and is appended hereto, as Appendix C.

QUESTIONS PRESENTED BY APPEAL

Inasmuch as the questions presented by this appeal are comprehensible only in the light of the history of this litigation, some statement of the background fact must be made in order that the presentation be intelligible. Little or no controversy relative to facts exists in the present case. The problems presented are essential problems of constitutional law.

A. Two original Complaints were filed by the present Appellants and others in the United States District Court for Colorado. Those persons, being public officials, citizens; and taxpayers of Colorado, appeared for themselves and representatively of others similarly situate, presenting action against the General Assembly, Governor, Secretary of State, and Treasurer of Colorado; and seeking injunctive and other relief as might be proper with reference to legislative apportionment in Colorado. That Complaint filed by Appellant Lucas was filed on July 9, 1962, and requested convocation of a three-judge Court. It alleged that Colorado exists under a Constitution adopted pursuant to Enabling Act of the Congress of the United States and subject to the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. It was alleged that one of the inalienable rights of citizenship in the United States and the State of Colorado is equality of franchise and of vote, and that the concept of equal protection of the laws requires that every citizen be equally represented in the legislature of his State. Those allegations were denied. The denial is of the essence of this proceeding.

1.1. It was, however, admitted that the then consti-

tution of Colorado, sections 45, 46, and 47, Article V, as first above set forth, required decennial state census in 1885 and thereafter, which census had never been taken; and required reapportionment of both houses of the state legislature after each such census, and in the session next following the United States Census. It was admitted that no such reapportionment had been made following the 1960 Census.

1.2. The following statistical allegations were made and proven, without dispute, from the Census, admitted by stipulation in evidence:

1.21. The population of Colorado in 1960 was 1,753,947. Each of its 35 senators, therefore, should have represented 50,113 persons, and each of its 65 representatives should have represented 26,984 persons. General population had increased 32.4% over 1950 population, but urban population had increased by 55.5%, while rural population declined 6.6% during the decennium.

1.22. Population in the largest Senate District, Jefferson County, was 127,520; that of the smallest Senate District, the 18th, was 17,481. Each citizen in that smaller district, then, was accorded representation approximately eight (8) times that in the largest district.

1.23. In like manner, a nine-to-one discrimination obtained between the most heavily represented House district and the least heavily represented such district.

1.24. In several districts, both House and Senate, representation was allowed and existed even though there were fewer persons within such districts than the statutorily prescribed minima for representation.

1.25. 29.8% of the population of Colorado, situate in its least populous Senatorial Districts, elected a majority of the Senate, and 32.1% of the population, in similarly unpopulated areas, elected the majority of the House of Representatives.

1.26. The Denver Metropolitan Area, consisting of Denver, Adams, Jefferson, Arapahoe, and Boulder Counties, were grossly misrepresented or under-represented. On average, a senator from one of the seven most populous districts represented 90,309 persons, nearly twice the number proper as shown in 1.21 above, while one from one of the eighteen least populous districts, electing the majority of the Senate, represented 39,013 persons, resulting in an average discrimination against the populated areas of 3 to 1. In the Metropolitan area itself, the City and County of Denver was favored over the surrounding counties in the ratio of 2 to 1, and similar conditions to those pertaining in the Senate obtained also in the House of Representatives.

1.3. It was admitted, and specifically found by the Trial Court in the first of its Memoranda Opinions that like conditions had obtained for many years, and that there has been a historical reluctance on the part of the General Assembly in Colorado to correct the situation.

2. The action was set for trial and final disposition on August 10, 1962. The Court rendered a unanimous per curiam opinion, Appendix A, in which it found essentially the facts above, and also held the resultant situation unconstitutional and violative of the Fourteenth Amendment. The Court held further that it could not act prior to the

then-impending November elections, and reserved the matter for further proceedings shortly after those elections.

3. The Court permitted during the trial intervention of the persons interested in forwarding Amendment 7, and almost all testimony presented was testimony as to what would be accomplished by that Amendment if it were adopted, so that the holdings relative to invalidity of the existing statutory arrangements, referentially incorporated in the Amendment, were made fully in contemplation of the possibility of the Amendment passage. Proponents of the amendment were allowed full participation in the August, 1962, hearings; they took part in every trial stage; and they presented then substantially every matter at the subsequent hearings presented in favor of their position.

4. Amendment 7, the text of which was set forth above, was adopted at the November elections.

5. Following those elections, and that adoption, amendment of the pleadings was permitted, by filing of Supplemental Complaints, raising constitutional questions, under the Fourteenth Amendment, occasioned by the adoption of the said Amendment 7.

6. The Supplemental Complaint incorporated the allegations of the Complaint, and made parallel objections to the provisions of Amendment 7. Essentially, that Amendment provides for a House of Representatives of 65 members, to be elected from districts "as nearly equal as may be", and to be decennially reapportioned, each member to be elected from a single-member district. It provides for a Senate of 39, rather than 35, members, the

4 additional members being arbitrarily assigned to Adams, Jefferson, Arapahoe, and Boulder Counties. The other senatorial districts remain fixed in the same manner previously in this action declared by the District Court unconstitutional. The districts are perpetually frozen, regardless of population or population change, and are unrelated to population, except that if they are multi-member districts — most being single member — they are required, within the district, to be decennially reapportioned upon the basis of population. The statute, declared void by the Memorandum Opinion, is incorporated in the Constitutional Amendment, and prohibited to be repealed or modified, as regards most of its particulars.

6.1. The Supplemental Complaints allege and Appellants contend that the Amendment is wholly invalid, in that it accepts and recognizes the principle of equal representation as to the House of Representatives, while denying that validity of that principle in the Senate, except as to the multi-member districts in the Senate. The Senate is frozen, in perpetuity, upon the basis of an apportionment judicially declared to be "irrational" and without fundamental historical or other basis in fact or law. Perpetual detachment from population fact is submitted to be wholly impermissible. Distinction between the single-member rural districts and the multi-member urban and metropolitan ones within the Senate arrangement is totally capricious. Resultantly, the Amendment is as a whole arbitrary, capricious, and invidious discrimination, particularly in the light of the fact that, as shown by Article V, Sections 45, 46, and 47, existing in the same form from the inception of statehood until 1962, Colorado has never recognized any basis other than a population

basis, for the selection of members either of the Senate or the House of Representatives. No basis, other than population, exists or has ever existed in Colorado for such districting or selection.

6.2. The distinctions made by the amendment are, in the light of equal protection requirements under the Fourteenth Amendment, invidious, discriminatory, and without basis in history, logic or reason, for which reasons it is contended that the Amendment is in its totality void:

6.21. Under the Amendment, the least populous Senate district is permitted one Senator for 18,414 persons. In the most populous district, a senator represents 71,871 persons. The situation is perpetually frozen. The district favored is one decreasing in population and which has been so steadily for many years. The district abused has gained continually in population, and must continue to do so, so that the distortion over a short period of time must become even more shocking and over a long period wholly unconscionable.

6.22. Under the Amendment, 460,620 persons elect 19 members of the Senate. 1,203,328 persons elect only 20 members of the Senate. Effectively, one-third ($1/3$) of the population controls the senate and controls legislation in Colorado. It was carefully designed, and candidly stated in the testimony, that this be the case, and be perpetual.

6.23. Historically, the mountain and rural population of Colorado has tended continually to decline. The urban population of the Denver area and a strip of territory ex-

tending along the base of the Mountains, from Denver to Colorado Springs, has constantly increased, and is one of the most rapidly growing population areas in the United States. The admitted intention of the amendment was to prevent representation of the majority of the population as a majority in the State Legislature. It was proposed, and is urged that it is necessary, forever to prevent majority control of the legislature.

6.24. The proponents of the Amendment, and the Appellees generally, have admitted that the Amendment does not constitute or attempt to provide for apportionment in accordance with the principle of equality of representation as of right, for they argue and maintain that there is no such right to representational equality. They admit that the Amendment was purposed, intended, and contrived to negative representation on a population basis, and to vest a controlling function perpetually in a clear minority of the population, described by the majority of the trial Court as representing "insular" interests, which are thus given, and intended to be given, perpetual legislative control of the State of Colorado.

7. The majority of the Trial Court has candidly upheld these contentions, and has specifically held that the "special interests" of the minority geographical groups are such as to justify a legislative distortion and its perpetuation. The majority has stated that representation only in accordance with population would accord these special interest groups insufficient legislative voice, and, effectively, that because in some manner this program has garnered votes sufficient to enact the Amendment the majority voting at the November, 1962, election may deprive all Colorado citizens of their rights under the Constitution

of the United States. The Appellants specifically contend that no vote of the population of any State, no matter by what majority, may abrogate the provisions of the Constitution of the United States, and may not permit the deprivation of any part of the citizenry of the State of the federally protected right to equal protection of the laws. The modification of the Colorado Constitution was attempted only because the Courts had indicated the gross impropriety of evasion of the old provisions of the Constitution, requiring reapportionment on fundamental population bases. Nothing but inherent economic selfishness, is forwarded as a reason for the amendment, and its perpetual freezing of Senatorial control in a minority of the voters of the State. It is submitted that representation under the Constitution is and can be nothing but representation of *people*, not of "interests", whatever those may be nor however overweening some may esteem them, and it is submitted that the allowing of validation of statutes, declared to be repugnant to the Constitution of the United States, by a voting majority in any state is fundamentally indefensible and a complete subversion of basic constitutional right. The limitations of a Constitution are in their essence protections of the individual against the many and of the citizen against the State. The limitations are limitations upon power, and specifically the power of the majority, to trespass beyond the bounds permitted. It is submitted that the opinion of the majority is simply an abdication of the principle of individual equal protection of the laws; that the right of any single individual to that protection transcends the economic "interests" of any group or area.

8. The Dissenting Opinion points out that the per curiam Memorandum Opinion, Appendix A, had already

held that the Plaintiffs had established their prima facie case of unconstitutionality against the protested measures and systems. It further observes that no logical basis exists to distinguish between Senate and House of Representatives, and that the equal protection clause applies to both, there being no analogy to the Congress of the United States, as discussed by this Court in *Gray vs. Sanders*, 83 S.Ct. 801.

8.1. That dissent particularly urges the principle of *Simcock vs. Duffy*, 215 F. Supp. 169, that "an apportionment should not be permitted that would allow a blockage of major legislation desired by the great majority of electors of Delaware to come to pass in the Senate. Effecting the will of the majority of the people of a State must be deemed to be the foundation of any apportionment plan." It is further urged, as concerns the validity of Amendment 7, that "the unpleasant truth is that it was particularly designed and dictated not by factual differences, but rather by political expediency. Simplicity and success at the polls overrode the considerations of fairness and justice. Thus, Amendment No. 7 fails the test of rationality in its adoption."

9. Basically, it is urged that there are no historic evidences supporting the theory written into Amendment 7, insofar as concerns Colorado. The majority opinion's assertion that freezing of this distorted situation is unimportant, since the Constitution may again be amended any day, is most unrealistic, and the remedy is meaningless to the individual whose individual right under the Fourteenth Amendment, paramount in our Constitutional scheme of things, is thus rendered useless.

10. The endeavor of the Majority Opinion is openly to fortify and assist certain "insular" economic interests, by holding that they must be allowed $2\frac{1}{2}$ to 1 majorities over interests of the majority of the people, resident in the urban areas, adequately to protect the "insular interest" against the majority. The Constitution contemplates no representation of mines nor the mountains which house them, nor plains and cattle nor the rivers which water them. It contemplates only the representation of people, each one equally whether he be miner, farmer, grazier, or urban resident, and none more than equally.

11. Appellants most respectfully submit that the present case presents the most clear and straight-forward situation yet judicially presented of wilful attempt of special interest to retain legislative entrenchment. For more than one hundred years, after a great war and a constitutional revolution following it, it has been clear that no State, no group of persons within a State, even the majority thereof, may cast off the protections given by the United States to each of its citizens. The matter sanctioned in this case in the form of Amendment 7 has no more dignity, status, or meaning than had the infamous acts of Nullification or Secession. *Baker vs. Carr*, it is submitted, should be viewed as a basic charter of freedom of the elector. The entire tendency of suffrage in the free world has been to the accomplishment of a fundamental voting equality between human units. Artificialities of the kind here upheld, we submit, are untenable, and it is submitted that jurisdiction properly vests in this Honorable Court in this case where, there being so few factual questions, the legal question is in its purest form clearly presented.

SUBSTANTIALITY OF GROUNDS

This appeal is a direct appeal from a three-judge Court convoked upon the basis of involvement of constitutionality of State statutes and State constitutional provisions, and directly within the provisions of Section 1253 above quoted and referred. The action involves a direct challenge to the apportionment statutes of Colorado, which have been held in the initial Memorandum Opinion (Appendix A) to be unconstitutional. It involves, as well, the constitutional validity under the Fourteenth Amendment of an Amendment to the Constitution of Colorado, which amendment was adopted and forwarded largely with the object of preventing application of the rule of representation of population in the Senate of Colorado. The problem, in its essence, is the problem first brought into focus by this Court in *Baker vs. Carr*, and now before this Honorable Court, and before the Courts of ultimate State jurisdiction and subsidiary Federal Courts in so many of the States.

It is to be noted that the effect of the Colorado Amendment is to freeze the Senate upon the basis of now existing districts. Those districts purport to have been established only a population basis, but have become in time so distorted as to create an invidious discrimination. The Trial Court before amendment so found and so held. The Amendment incorporates the unconstitutional statute, and does not permit of change of the districts established by it. It does provide that the few multi-member districts are, internally, to be broken into single member constituencies, reapportioned from time to time on a population basis. The single-member districts, however, are established to protect interests in the relatively unpopulated

areas, so that distortion must become necessarily worse as time progresses.

This Court has remarked in *Gray vs. Sanders*, 83 S. Ct. 801 (March 18, 1963), in discussion the Georgia County Unit System, that under the Act there considered "the vote of each citizen counts for less and less as the population of the county of his residence increases." This, of course, is precisely true of the altered Colorado Senate, where, as the control is vested in dwindling counties, the vote of each of these cattle raisers, or agriculturists, or miners, mentioned as such because the Trial Court assumes protection of their economic interests as such to be a justification of the distortion, becomes ever greater as population decreases, while the dwellers in metropolitan and urban areas have ever less individual voice as the population in those areas waxes greater.

There is no historical basis for this kind of situation in Colorado, since our constitution has always based legislative representation on population, and had no other standard. Our counties are not long-founded historical units, but have been often altered, and are held to be simply administrative arms of the State, modifiable at its will. The Colorado Supreme Court held in *Dixon vs. People*, 53 Colo. 527, 127 Pac. 930, that a county is an involuntary political and civil division of the territory of the state, created to aid in administration of governmental affairs, a quasi corporation for orderly government within the scope of its authority, and nothing more than a governmental agency or political subdivision, exercising locally some functions of state government; as repeated in *Colorado Investment And Realty Co. vs. River-*

view Drainage Dist., 83 Colo. 468, 266 Pac. 501, and *Game-well vs. Strumpler*, 84 Colo. 459, 271 Pac. 180.

There is no argument available as to parallelism between the State legislatures and the Congress, or the electoral college, for no such historical bases of parallelism exists. The United States was a union of sovereign states, but the State of Colorado was not, certainly, a union of Counties. *Gray vs. Sanders, supra*, at page 807, rather elaborately discussed the invalidity of such assumed historical parallel.

It is submitted that the argument of control by tiny minorities of citizens, with special economic interests, of the destinies of a state, simply because they are few in number, is quite irrational, and violative of the basic requirements of equal protection, as stated by this Court in *Gray vs. Sanders*, at page 808:

“How, then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal voice — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State when he casts his ballot in favor of one

of several competing candidates, underlies many of our decisions."

This Court has further stated that "the conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — One Person, One Vote."

It is most respectfully submitted, then, that if, as stated, there is no Constitutional indication that homesite affords a permissible basis for distinguishing between voters; if equality of voting power is required; if the ruling conception is One Person, One Vote; if representation is a representation of people in a State legislature, then, since the whole trend of voting history has been to expand and equalize the franchise and representation, a regressive, and an irrational measure, such as Amendment 7, openly advocated as an antidote to the doctrines of equality of franchise most recently coming from this Court, should not be permitted to stand. That Amendment does not expand and equalize representation. It contracts and freezes disparity, making it ever greater as the numbers of urban and suburban dwellers increase. As the unit in which a person lives becomes more economically and demographically important, the voice of the voter and of the area decreases, so that the system is entirely regressive and calculated and stated to preserve control in a group of counties of ever-dwindling importance. Representation in this nation is not of *interests*. It is of *people*. If that principle clashes with the needs of economic interests, it is submitted that the economic interest must yield.

In Colorado, under the proposed arrangement, 18,414

persons in Park, Clear Creek, Gilpin, and Chaffee counties, unpopulated areas of mountains, having as their primary function some mines, equal 71,871 persons in Pueblo, an industrial steel city. They will always do so, moreover, except that Pueblo has an expanding population, and the mountain counties decrease continually in population. This we submit is offensive.

Mann vs. Davis, supra, is now pending before this Court. Very similar problems to those in Colorado are presented by that case.

There the Court specifically considers that meaning of apportionment as intimately tied to population, and remarks that "in this consideration there is no difference in status between the Senators and Delegates in their disposition throughout the State. The Senate and the House each have a direct, indeed the same, relation to people. No analogy of the State Senate with the federal Senate in the present study is sound. The latter is a body representative of the states qua states, but the state Senate is not its regional counterpart. State senatorial districts do not have state autonomy. The bicameral system is a creature of history and many of the reasons for its creation no longer obtain. The chief justification for bicameralism in state government now seems to be the thought that it insures against precipitate action — imposing greater deliberation — upon proposed legislation."

It is submitted, then, that since *population* is the essential predicate for representation in a state legislature, a device which uses the check of the Senate to thwart legislation, by keeping that Senate under control of a minority, ever decreasing, of the population is invalid.

Much the same problems existed in litigation in *Scholle vs. Hare*, 116 N.W.2d 350, 367 Mich. 176, voiding a system much parallel to the recently attempted Colorado one. The Court remarks, in voiding the Michigan situation, that "*our present senate, of course, does not follow any plan. It is simply an arbitrary freezing in of the various districts.*"

Precisely the same thing is true of the Colorado Senate under Amendment 7.

It is submitted that the issues presented by the apportionment decisions, cognate to the issues presented in the integration matters, are the paramount constitutional issues currently before our Courts.

No question exists that there is jurisdiction in the federal courts to resolve the problem. The three-judge court is in entire agreement that such is the case. That Court is, however, divided, two to one, in its substantive opinion. There are few if any factual questions before the Court. There is a very fundamental legal question, most squarely presented by the Colorado Amendment. That question is simply whether it is possible in the way done in Colorado to separate the Senate perpetually from population considerations and thus to vest effective legislative control in an ever-decreasing minority of the population.

Only the Supreme Court of the United States may ultimately resolve that question. It is of pressing importance, inasmuch as it is quite problematical even in what manner the next elections to the Colorado legislature are to take place until that matter be resolved. The record demonstrates the anxiety of the three-judge Court expe-

ditionously to resolve that matter, in direct expectation that the matter would come before the Supreme Court in the current term.

It is, then, respectfully submitted that the issues are substantial; that this Court has taken cognizance of the like issues related to other states, and now pending before this Court as set forth above; and that jurisdiction should be taken of the instant appeal.

Most respectfully submitted,

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Attorneys for Appellants

Appendix A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 7501

**ARCHIE L. LISCO, AND ALL OTHER REGISTERED VOTERS OF
THE DENVER METROPOLITAN AREA, STATE OF COLO-
RADO, SIMILARLY SITUATED,**

Petitioners,

v.

**STEPHEN L. R. McNICHOLS AS GOVERNOR OF THE STATE OF
COLORADO, TIM ARMSTRONG AS TREASURER OF THE
STATE OF COLORADO, GEORGE BAKER AS SECRETARY
OF THE STATE OF COLORADO, THE STATE OF COLORADO
AND THE GENERAL ASSEMBLY THEREOF,**

Respondents.

Civil Action No. 7637

**WILLIAM E. MYRICK, JOHN CHRISTENSEN, ED SCOTT, GOR-
DON TAYLOR, HENRY ALLARD, ANDRES LUCAS, JOHN L.
KANE, WILLIAM J. WELLS, FRANK A. CARLSON, WILLIAM
EPPINGER, ALLEN L. WILLIAMS, RUTH S. STOCKTON,
KENNETH FENWICK, CHESTER HOSKINSON, and JOE B.
LEWIS, individually and as citizens of the State of Colorado,
residents in the Counties of Adams, Arapahoe, and Jefferson,
and taxpayers and voters in the State of Colorado, for them-
selves and for all other persons similarly situate,**

Plaintiffs and Petitioners,

v.

**THE FORTY-THIRD GENERAL ASSEMBLY OF THE STATE OF
COLORADO; HON. STEPHEN L. R. McNICHOLS, AS GOV-
ERNOR OF THE STATE OF COLORADO; HON. TIM ARM-
STRONG, AS TREASURER OF THE STATE OF COLORADO,
AND HON. GEORGE BAKER, AS SECRETARY OF STATE OF
THE STATE OF COLORADO,**

Respondents and Defendants.

**FEDERAL PLAN FOR APPORTIONMENT, INC., a Colorado corpora-
tion not for profit, Edwin C. Johnson, John C. Vivian, Joseph
F. Little, Warwick Downing, Wilber M. Alter, as incorporators
and directors thereof and individually and as citizens, residents
and taxpayers of the State of Colorado, and John Doe, individu-
ally and as a citizen of the State of Colorado, a resident and
inhabitant of the City and County of Denver, and a taxpayer
of the State of Colorado, on behalf of themselves and for all
persons similarly situate,**

Interveners.

**Filed, United States District Court, Denver, Colorado, Aug. 10, 1962
G. Walter Bowman, Clerk.**

Messrs. Salazar and Delaney, Attorneys at Law, 304 Denver-U.S. National Center, 1700 Broadway, Denver 2, Colorado, for Petitioners in Civil Action No. 7501; Honorable Duke W. Dunbar, Attorney General for the State of Colorado, Frank E. Hickey, Deputy Attorney General, and Richard W. Bangert, Assistant Attorney General, 104 State Capitol, Denver 2, Colorado, for Respondents in Civil Action No. 7501.

Charles Ginsberg, Esquire, George Louis Creamer, Esquire, 928 Equitable Building, Denver 2, Colorado, for Plaintiffs and Petitioners in Civil Action No. 7637; Honorable Duke W. Dunbar, Attorney General for the State of Colorado, Frank E. Hickey, Deputy Attorney General, and Richard W. Bangert, Assistant Attorney General, 104 State Capitol, Denver 2, Colorado, for Respondents and Defendants in Civil Action No. 7637.

Charles S. Vigil, Esquire and Richard S. Kitchen, Sr., Esquire, 2155 First National Bank Building, Denver 2, Colorado, for Interveners.

Philip J. Carosell, Esquire, 430 Majestic Building, Denver 2, Colorado, Amicus Curiae.

MEMORANDUM OPINION

Per Curiam.

The above cases were consolidated for trial and disposition. The actions in each instance are on behalf of the plaintiffs for themselves and others similarly situated as taxpayers and qualified voters of the State of Colorado.

In Civil Action No. 7501 it is alleged that the plaintiff

is a property owner and a registered voter who resides in Denver. He seeks to compel certain state officers to take specific affirmative action for the purpose of complying with the Fourteenth Amendment to the Constitution of the United States.

In Civil Action No. 7637 the plaintiffs allege that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States guarantees equality of franchise and the present legislative apportionment statutes¹ deprive them of the equality of franchise and vote which the Fourteenth Amendment guarantees, whereby these statutes are in conflict therewith; that the statute as applied to the 1960 federal census reveal gross inequalities and disparities in voting rights; that in some instances the disparities reach a proportion of eight-to-one.

Defendants, the Governor, State Treasurer, Secretary of State and General Assembly of the State of Colorado, have filed answers in which they challenge the jurisdiction of this Court, assert their own immunity from suit, and deny any unconstitutional discriminations.

Certain proponents of an initiated measure have, with the permission of the Court, intervened. From their complaint it appears that they are sponsoring an amendment to the Colorado Constitution which will appear on the ballot in the general election to be held in November, 1962. This measure according to the allegations of the petition and the evidence adduced at the hearing, would constitutionally establish the senatorial districts and would at the same time increase the membership of the Senate, giving additional senators to more populous districts and would

¹Sections 63-1-2, 63-1-3 and 63-1-6, C.R.S. 1953.

authorize the districting of the House upon a population basis in the year 1963 and after each federal census thereafter. From the petition it also appears that another amendment² will appear on the November ballot. This would provide for the districting of both houses by a commission on a population basis, subject to review by the Supreme Court of Colorado. The prayer of interveners is that the Court dismiss these actions, or continue the consolidation cause until after the November election, or declare invalid Section 47 of Article V of the Colorado Constitution which, according to interveners, forbids the subdivision (by the Legislature) of legislative districts³.

The Colorado legislature, which is called the General Assembly, is bicameral in character. The Senate has 35 members, elected for four-year staggered terms from 25 senatorial districts which are created by statute⁴. The House of Representatives has 65 members who are elected for two-year terms from 35 districts which are created by statute⁵.

C.R.S. 1953.

The apportionment provision in the Colorado Constitution⁶ authorizes the Assembly to create districts and to fix ratios, but requires that this be done with reference to federal or state enumerations. It provides that after each census made as provided by the State, or under the authority of the United States, the General Assembly

²No. 8. The amendment sponsored by interveners is No. 7 on the ballot.

³Since these measures are on the November ballot and could not apply to the upcoming Assembly, and since both require implementation, they would not take effect until 1964.

⁴Colorado Constitution, Article V, section 3 and sections 63-1-3, 63-1-4, C.R.S. 1953.

⁵Colorado Constitution, Article V, section 3 and section 63-1-6.

⁶Article V, section 45.

"shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration according to ratios to be fixed by law."

In an original proceeding in the Supreme Court of Colorado, No. 20240. *In the Matter of Legislative Reapportionment*, that court, in a decision filed July 6, 1962, construed the provision of the Constitution of Colorado in respect to the mandate to the Legislature to reapportion following the United States census to not require that apportionment take place in the session immediately following the census. The holding was that the "session next following an enumeration made by the authority of the United States" does not require reapportionment at the session *immediately* following the census report and as applied to the case before the Court held that "such legislation is not mandatory until the Forty-fourth General Assembly convenes."

The federal constitutional question here presented was not considered, but the Court noticed the fact that the mentioned initiative measures will appear on the ballot in November and in recognition of this and of the possible defeat of both measures, the court retained jurisdiction until June 1, 1963, granting leave to reopen at that time if no constitutional amendment or legislative apportionment has meanwhile been adopted.

The record discloses that since Colorado first achieved statehood there has been a modicum of apportionment, either real or purported, and also that there have been

¹That is, until January, 1963.

²In which case the Forty-fourth General Assembly would have to act on the issue. Both of these constitutional amendments would require legislative implementation.

several abortive attempts. Since 1876 the General Assembly has been reapportioned, or redistricted, five times: in 1881, 1901, 1913, 1932 and 1953. The 1953 statutes⁹ are now in effect. Measures were introduced in the last General Assembly¹⁰ to reapportion with reference to the 1960 federal census report. These measures failed to pass. One initiated reapportionment act has been passed during the period since 1876. This measure was adopted in 1932 but following its adoption the General Assembly passed its own legislative reapportionment act in 1933 which was designed to thwart the operation of the initiated act. This latter act was held by the Colorado Supreme Court to be unconstitutional¹¹.

Factual data presented at the trial reveals the existence of gross and glaring disparity in voting strength as between the several representative and senatorial districts. Colorado's present population, determined by the 1960 federal census, is 1,753,947. During the decade from 1950 to 1960 there was a percentage increase amounting to 32.4. During this period the urban areas increased 55.5 per cent, and there was a decrease in the rural areas amounting to 6.6 per cent. The population in 36 of the 63 counties decreased. Some specific examples of the disproportion are here mentioned: The most exaggerated example is in a district (having a single representative) which was shown to have a population of only 7,867 as compared with another representative district (having two representatives) for a population of 127,520 people. Similar disparity exists in the senatorial districts. A single senator represents a district of 127,520 people while another senator-

⁹Section 63-1-1, supra.

¹⁰The Forty-third.

¹¹*Armstrong v. Mitten*, 95 Colo. 425, 37 P. 2d 757.

has 17,481 people in his district. A senator from one of the seven most populous districts represents on the average 90,309 constituents; a senator from one of the eighteen least populous districts represents on the average 29,013 persons. A representative from one of the seven most populous districts represents on the average 46,342 while a representative from one of the twenty-eight less populous districts represents an average of 15,993 persons. Also noteworthy is the fact that 29.8 per cent of the 1960 population is capable of electing a majority of the Senate, and 32.1 per cent of the population is capable of electing a majority in the House of Representatives. Stated differently, it can be said that 562,741 persons elect 33 representatives, a majority, whereas 1,190,306 persons elect 32 representatives, a minority of the House. Similarly, in the Senate 556,912 voters elect 19 of the 35 senators, whereas 1,207,035 elect the remaining 16 senators.

The inevitable effect of the present Apportionment Act¹² has been to develop severe disparities in voting strength with the growth and shift of population. It provides that the ratio for the apportionment of senators shall be one for each senatorial district for the first 19,000 of population and one ~~for~~ each additional 50,000 or fraction over 48,000. The ratio fixed for the House is one representative for the first 8,000 of population and an additional representative for each additional 25,000 or fraction over 22,400 of population. The inevitable consequence of these ratios is the kind of disparity which now exists.

Three questions need to be discussed at this time. They include: *First*, the issue of exercise of jurisdiction; *secondly*, the question whether the disparity in voting

¹²Section 63-1-2.

strength which is described above sufficiently establishes the unconstitutionality of the districting statutes as applied to these plaintiffs; and *thirdly*, the question whether upon the basis of the present showing—the circumstances before us—we are justified in now granting relief.

I.

THE JURISDICTION QUESTION

The plaintiffs seek "to redress the deprivation, under color of * * * State law * * * of * * * right, privilege of immunity secured by the Constitution of the United States * * *," and thus they bring themselves within the terms of Title 28 U.S.C. §1343(3). The action seeks an injunction against enforcement of state statutes upon the ground of their unconstitutionality pursuant to Title 28 U.S.C. §2281 and requires a three-judge court created pursuant to Section 2284. *Baker v. Carr*¹³ holds that a claim such as the present one, based as it is upon alleged denial of a state statute creating disproportionate legislative representation, constitutes a justiciable issue; that the plaintiffs in such case assert a right cognizable by a federal district court. This decision eliminates any doubt as to jurisdiction of this Court to hear and determine the cause. The argument of the Attorney General that the Colorado Supreme Court has preempted jurisdiction by first hearing the controversy, is without merit in view of the fact that the Supreme Court of Colorado has refrained from even considering the issue of infringement of the plaintiffs' fed-

¹³369 U.S. 186, 82 S.Ct. Adv. Sheet 691, the decision of the Supreme Court which has given rise to these suits.

erally-guaranteed constitutional rights. The only question of a jurisdictional nature is whether under the circumstances here presented this Court should as a matter of policy abstain from the exercise of jurisdiction. *General Investment & Service Corporation v. Wichita Water Company*, 10 cir., 236 F. 2d 464, lays down the standards applicable to acceptance or abstinence. It is there said:

" * * * The principle is well established and without dispute that under the rule of comity under our dual system of Government in cases involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need be cited to support this statement. It is recognized without exception. The Supreme Court has held that where there is pending in the federal court a case involving the construction of a state law and if one construction will remove the federal question a federal court should stay its hand, retain jurisdiction and relagate the parties to the state court to first seek a construction of the statute * * *"

See also *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341; 71 S. Ct. 762; *Corporation Commission of Oklahoma v. Cary*, 296 U.S. 452, 56 S. Ct. 300; *Burford v. Suh Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098; *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070.

The considerations which demand abstinence are not present in the instant case. Here, the General Assembly

of the State of Colorado has repeatedly refused to perform the mandate imposed by the Colorado Constitution to apportion the legislature. The likelihood that the unapportioned General Assembly will ever apportion itself now appears remote. The Supreme Court of Colorado, while retaining jurisdiction of the subject matter of the controversy presented to it, has postponed further consideration of the cause until June, 1963. Under these circumstances, we must conclude that the parties do not, at least at present, have an adequate, speedy and complete remedy apart from that asserted in the case at bar and thus grounds for abstention are at this time lacking.

Nor is there any merit in the contention of the Attorney General that the suit is against the State. The action is against state officers. It seeks injunctive relief against violation of the federal constitution, and thus sovereign immunity is not an issue. *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 72 S. Ct. 321; *Harrison v. St. Louis & Santa Fe R. Co.*, 232 U.S. 318, 34 S.Ct. 333.

II.

THE INEQUALITY IN VOTING STRENGTH AS SHOWING UNCONSTITUTIONALITY OF THE DISTRICTING STATUTES

Baker v. Carr does not pass directly on the validity of the apportionment reflected by the Tennessee Districting Statutes. It merely recognizes that allegations of debasement of franchise growing out of disproportionate voting rights tender issues of constitutionality cognizable by federal courts. No guidelines or criteria are laid down

for determining the extent or level of disproportion necessary to constitute infringement of the Equal Protection Clause of the Fourteenth Amendment. Thus, the body of case law construing the Equal Protection Clause applies.

It is, of course, axiomatic that absolute equality between classes is not essential to validity under the Equal Protection Clause, but a rational basis for the legislative distinctions is necessary.

The test usually employed for determining whether the discrimination is valid or invalid—rational or irrational—is whether the discrimination is “invidious.”¹⁴ In his concurring opinion,¹⁵ Mr. Justice Douglas reiterates the “invidious” test as the proper one: (82 S.Ct. Adv. sheet, p. 724)

“The traditional test under the Equal Protection Clause has been whether a State has made ‘an invidious discrimination,’ as it does when it selects ‘a particular race or nationality for oppressive treatment.’ See *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655. Universal equality is not the test; there is room for weighting. As we stated in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563, ‘The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.’”

In *Moss v. Burkhart, et al.*, No. 9130 in the United States District Court for the Western District of Okla-

¹⁴(Among the definitions given by Webster for this somewhat ambiguous term are, “of an unpleasant nature; hateful; obnoxious.”)

¹⁵In *Baker v. Carr*, *supra*.

homa, the disparity in voting strength between citizens of one county as compared with citizens of another county exceeded in some instances ten-to-one. The court there found that both branches of the Legislature had consistently disregarded the State Constitution with respect to apportionment.

The Court went on to note that one vote for a representative in one country was equal to fourteen votes for the same offices in another county, and eleven votes in still another county. The Court said that the disparity existing in the senatorial districts was even greater. On the basis of this evidence it was concluded that the discrimination was gross and egregious, "and without rational basis or justification in law or fact." The Court proceeded to hold that the apportionment act as it then existed in Oklahoma was "invidiously discriminatory" as against the plaintiff in the action and class of voters which he represented.¹⁶

The Supreme Court of Michigan, in *Schalle v. Hare*, 31 Law Week 2059, found invidious discrimination in a less aggravated fact setting. It was there said:

" * * * that any law of our State giving some citizens more than twice the votes of other citizens in either the primary or general election would lack constitutional equality so as to void that law. * * * When a legislative apportionment provides districts having more than double the population of others, the constitutional range of discretion is violated. This is not to say that less than such 2 to 1 ratio is con-

¹⁶Final judgment has been postponed until April, 1963 to give the Oklahoma legislature a further opportunity to reapportion.

stitutionally good. It is to say only that peril ends and disaster occurs when that line is crossed."¹⁷

At the hearing the plaintiffs offered exhibits showing the population of the state, the counties, and the senatorial and representative districts and rested their case on the proposition that such exhibits show such a disparity in representation as to establish invidious discrimination and to destroy any claim of rationality in the apportionment of the legislature. The defendants assert that the legislative districts are justified by topographic, geographic, historical and economic factors which have been applied in a rational manner but they presented no evidence to sustain their position. The interveners called two witnesses, each of whom recognized a malapportionment of the House, and with general statements defended the apportionment of the Senate. Their testimony with regard to the Senate is weakened by their own initiated proposal which makes changes in the apportionment of that body. In effect, we are left with a situation where one side says that the population figures show invidious discrimination and the other side says that the disparities so shown are not sufficient to overthrow the presumption of constitutionality.

We recognize that a statute is presumed constitutional, and that he who attacks the constitutionality of a statute bears a heavy burden.¹⁸ The population statistics presented by plaintiffs and challenged by no one, show

¹⁷Although the Michigan Court held the Senate districting system unconstitutional, the Supreme Court stayed execution on the order enjoining the primary election.

¹⁸*Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 3 L. Ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, 4 L. Ed. 629; *Powell v. Pennsylvania*, 127 U.S. 678, 8 S. Ct. 492, 32 L. Ed. 253; *Nicol v. Ames*, 173 U.S. 509, 19 S. Ct. 522, 43 L. Ed. 786; *Fleming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435.

the disparities we have heretofore noted. They are of sufficient magnitude to make out a *prima facie* case of invidious discrimination which rebuts the presumption. Accordingly, the defendants were obliged to show that there exists some rational basis for these disparities.

To sustain the rationality of the present districting of the Colorado General Assembly we are left with those facts which may be judicially noticed. We know that Colorado is a large state having two counties with an area of over 4,000 square miles and a number of counties of more than 2,000 square miles in size. We know that the east half of the state is a land of plains and the west half a land of mountains. The population is now concentrated in the metropolitan centers of Denver, Pueblo and Colorado Springs, all located in a narrow strip east of the Continental Divide. The economic interests of the farmers and miners, the stock raisers and the oil producers, the merchants and the consumers, the employers and the employees, industry and recreation, the mountains and the plains, the large cities and the small towns, have many differences. The Colorado statutes reflect that traditionally the districting of the legislature has favored certain areas with a great emphasis on the mining counties which was changed, at least partially, by the 1932 initiated measure which increased the representation of the eastern farming counties. We know too, that in the last twenty years the population has become more and more concentrated in the metropolitan areas.

These matters of general knowledge may justify disparities in legislative districts. They do not, of themselves, sustain the rationality of the legislative districts as they

now exist. Reliance on generalities is misplaced when a case must be decided on the basis of specific situations.

We are asked to stay our hands until the State has acted through its machinery. The principle that there should be a minimum of judicial intrusion by federal courts into the governmental affairs of a state needs no amplification. We are aware that the integrity and independence of state governments must be preserved and that the states must have the widest possible latitude in the conduct of their internal affairs and in the solution of their own problems. Of comparable importance is the protection of the individual in the enjoyment of his constitutional rights and privileges. The sensitive balance which must be maintained between the protection of individual rights and the preservation of state integrity cautions against precipitate action.

III.

WHETHER A DECREE SHOULD BE ENTERED NOW

There are additional considerations which bear on whether a decree should be entered at this time adjudicating the constitutionality of the Colorado districting statutes and decreeing a scheme of apportionment in the event of a holding of unconstitutionality.

The record before us is, as shown above, inadequate. The trial of the case was completed in one day and the only testimony offered was that on behalf of the interveners. Although plaintiffs offered a number of exhibits showing the extent of voter strength disproportion, there was no evidence describing possible plans for remedying

invidious discrimination should the same be found. Considering the lack of substantial evidence of this character, it would be presumptuous for this Court to devise a plan on its own initiative.

Secondly, in view of the magnitude of the task, the time is wholly inadequate. The political parties have now held their assemblies at which candidates have been designated to appear on the ballot at the primary election which is scheduled to take place on September 11, 1962. Any positive orders which we might enter at this time would likely interfere with this election and would have a disruptive effect. The time available is so insufficient as to render it impractical, if not impossible, to now deal with the merits of the case.

In the light of the foregoing, we conclude that final adjudication should be postponed until a further hearing has been held on all issues.

We further conclude that the case presented is not one for temporary injunctive relief and that there should be no impediment to the orderly conduct of the election or interference with the electorate in the free expression of their opinions on the initiated measures at the coming election; accordingly, it is

ORDERED that the cause be continued until on or about November 15, 1962. On or about that date a pre-trial hearing shall be held, and soon thereafter a further trial on the merits. It is

FURTHER ORDERED that all motions for temporary injunctions be denied.

Notices of the exact date and hour of further hearings will be furnished at a later date.

DATED at Denver, Colorado, this tenth day of August, A.D. 1962.

BY THE COURT:

JEAN S. BREITENSTEIN, Judge
United States Court of Appeals

ALFRED A. ARRAJ, Chief Judge
United States District Court

WILLIAM E. DOYLE, Judge
United States District Court.

Appendix B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 7501

**ARCHIE L. LISCO, and all other registered voters of the Denver
Metropolitan Area, State of Colorado, similarly situated,**

Plaintiffs,

v.

**JOHN LOVE, as Governor of the State of Colorado, HOMER BED-
FORD, as Treasurer of the State of Colorado, Byron Anderson,
as Secretary of the State of Colorado, THE STATE OF COLO-
RADO and THE FORTY-FOURTH GENERAL ASSEMBLY
THEREOF,**

Defendants.

Civil Action No. 7637

**WILLIAM E. MYRICK, JOHN CHRISTENSEN, ED SCOTT, GOR-
DON TAYLOR, HENRY ALLARD, ANDRES LUCAS, JOHN
L. KANE, WILLIAM J. WELLS, FRANK A. CARLSON, WILL-
IAM EPPINGER, ALLEN L. WILLIAMS, RUTH S. STOCKTON,
KENNETH FENWICK, CHESTER HOSKINSON, and JOE B.
LEWIS, individually and as citizens of the State of Colorado,
residents in the Counties of Adams, Arapahoe, and Jefferson,
and taxpayers and voters in the State of Colorado, for them-
selves and for all other persons similarly situated,**

Plaintiffs,

v.

**THE FORTY-FOURTH GENERAL ASSEMBLY of the State of Colo-
rado, JOHN LOVE, as Governor of the State of Colorado,
HOMER BEDFORD, as Treasurer of the State of Colorado, and
BYRON ANDERSON, as Secretary of State of the State of Colo-
rado,**

Defendants.

Civil Actions No. 7501 and No. 7637

**EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH F. LITTLE,
WARWICK DOWNING, and WILBUR M. ALTER, individually
and as citizens, residents and taxpayers of the State of Colorado,
on behalf of themselves and for all persons similarly situated,**

Intervenors.

**Filed United States District Court, Denver, Colorado July 16, 1963
G. Walter Bowman, Clerk**

Francis R. Salazar and Carl Harthun, Attorneys at Law, 304 Denver-U. S. National Center, 1700 Broadway, Denver 2, Colorado, for Plaintiffs in Civil Action No. 7501.

George Louis Creamer and Charles Ginsberg, Attorneys at Law, 928 Equitable Building, Denver 2, Colorado, for Plaintiffs in Civil Action No. 7637.

Duke W. Dunbar, Attorney General for the State of Colorado, and Richard W. Bangert, Assistant Attorney General for the State of Colorado, 104 State Capitol, Denver 2, Colorado; Anthony F. Zarlengo and V. G. Seavy, Jr., Attorneys at Law, 830 Majestic Building, Denver 2, Colorado, for Defendants in Civil Actions No. 7501 and No. 7637.

Richard S. Kitchen, Charles S. Vigil and Harvey Williams, Attorneys at Law, 2155 First National Bank Building, Denver 2, Colorado, for Intervenors in Civil Action No. 7501 and No. 7637.

Philip J. Carosell, Attorney at Law, 430 Majestic Building, Denver 2, Colorado, Amicus Curiae in Civil Actions No. 7501 and No. 7637.

MEMORANDUM OPINION AND ORDER

Before BREITENSTEIN, Circuit Judge, and ARRAJ and DOYLE, District Judges.

BREITENSTEIN, Circuit Judge.

These consolidated actions attack the apportionment of the membership of the bicameral Colorado legislature. At the 1962 General Election, two initiated constitutional amendments were submitted to the electorate. One, known as Amendment No. 7, provided for a House of Representatives with the membership apportioned on a per capita basis and for a Senate which was not so apportioned. The other, Amendment No. 8, apportioned both chambers on a per capita basis. Amendment No. 7 carried in every county of the state and Amendment No. 8 lost in every county.¹ The contest over the conflicting theories presented by these two proposals has now shifted from the political arena to the court. The issue is whether the Federal Constitution requires that each house of a bicameral state legislature be apportioned on a per capita basis.

The plaintiffs are residents, taxpayers, and qualified voters within the Denver Metropolitan Area. The defendants are various state officials² and the Colorado General Assembly. The complaints as originally filed on March 28 and July 9, 1962, respectively, challenged the apportionment of legislative membership under the then existing constitutional and statutory provisions. Because the suits presented substantial questions as to the constitutionality of state statutes and sought injunctive relief, a three-judge court was convened under 28 U.S.C. § 2281. The proponents of Amendment No. 7, which had then been submitted to the Colorado Secretary of State for

¹See footnote 32, *infra*.

²Since the suits were filed, the incumbents of these offices have changed. An appropriate order of substitution has heretofore been made under Rule 25(d), F.R.Civ.P.

inclusion on the ballot at the 1962 General Election, were permitted to intervene.³

On August 10, 1962, after trial, the court held⁴ that it had jurisdiction, that the plaintiffs had capacity to sue, that the evidence established disparities in apportionment "of sufficient magnitude to make out a *prima facie* case of invidious discrimination," and that the defendants had shown no rational basis for the disparities. The court noted that the aforementioned initiated constitutional amendments would be on the ballot at the ensuing General Election, declined to enjoin the forthcoming primary election and to devise a plan of apportionment, and continued the cases until after the General Election.

Following the approval by the electorate of Amendment No. 7, the plaintiffs amend their complaints to assert that Amendment No. 7 violates the Fourteenth Amendment to the United States Constitution by apportioning the Senate on a basis other than population and that, as the provisions of Amendment No. 7 are not severable, the entire amendment is invalid. In answering the amended complaints, the defendants renewed their jurisdictional objections and asserted the constitutionality of Amendment No. 7.

We are convinced that the allegations of the complaints are sufficient to establish federal jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, and that the

³Four of the intervenors are residents, taxpayers, and qualified voters of the counties within the Denver Metropolitan Area and the other of Moffat County. One intervenor was a nonprofit corporation and it has been heretofore dismissed from the case on the ground of a lack of capacity to sue.

⁴See *Lisco v. McNichols*, D.C. Colo., 208 F. Supp. 471, 478.

plaintiffs have standing to sue.⁵ The relief sought is a declaration that Amendment No. 7 is void, that the therefore existing statutory apportionment is void, and that the court fashion appropriate injunctive relief to assure equality in voting rights. Although the prime attack is now against a provision of the state constitution rather than a state statute, the necessity of adjudication by a three-judge district court⁶ is still present.⁶

The Colorado legislature met in January, 1963, and passed a statute, H. B. No. 65, implementing Amendment No. 7. No question is raised concerning the implementing legislation.

Amendment No. 7⁷ created a General Assembly composed of a Senate of 39 members and a House of Representatives of 65 members. The state is divided into 65 representative districts "which shall be as nearly equal in population as may be" with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which "shall be as nearly equal in population as may be." Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census.

The defeated Amendment No. 8⁸ proposed a three-

⁵Baker v. Carr, 369 U.S. 186, 204-208.

⁶See American Federation of Labor v. Watson, Attorney General, 327 U.S. 582, 592-593, and Sincov v. Duffy, D.C.Del., 215 F. Supp. 169, 171-172.

⁷See Appendix A following this opinion.

⁸See Appendix B following this opinion.

man commission to apportion the legislature periodically. The commission was to have the duty of delineating, revising and adjusting senatorial and representative districts. Its actions were to be reviewed by the Colorado Supreme Court. The districting was to be on a strict population ratio for both the Senate and the House with limited permissible variations therefrom.

The record presents no dispute over the material and pertinent facts. The parties disagree as to the conclusions to be drawn from these facts. The plaintiffs rely entirely on statistics said to show that population disparities among the senatorial districts result in over-representation of rural areas. The defendants and intervenors assert that the senatorial districts, and the apportionment of senators thereto, have a rational basis and violate no provisions of the Federal Constitution.

The prime position of the plaintiffs is that representation in proportion to population is the fundamental standard commanded by the Federal Constitution. They say that this standard requires that each house must be made up of members representing substantially the same number of people.

The principle of equal weight for each vote is satisfied by a system under which all members of the legislature are elected at large. Such system would result in absolute majority rule and would effectively deny representation to minority interests. Although it would assure no dilution of weight of any individual's vote, it presents the danger of dilution of the representative and deliberative quality of a legislature, because of the practical diffi-

culties of intelligent choice by the voters and because of the hazard of one-party domination.

The disadvantages of elections at large are overcome by the principle of districting. This principle provides representation to interests which otherwise would be submerged by the majorities in larger groups of voters.

From the very beginning of our Nation, districting has been used at all levels of government—national, state and local.⁹ The application of the districting principle to a state legislature requires the division of the state into geographical areas and the apportionment of a certain number of members of the legislature to each district. The plaintiffs say that the district boundaries must be so drawn, and the apportionment to each so made, that the result is substantial equality in the number of people represented by each member of each chamber of the legislature. The query is whether this is required by the Federal Constitution.

Baker v. Carr sets up no standards for the apportionment of a state legislature. That decision rejects the Guaranty Clause¹⁰ as a basis for judicial action in such cases and speaks in terms of Equal Protection Clause of the Fourteenth Amendment with overtones of the Due Process Clause. The application of these principles causes us difficulty. If we are concerned with equal protection, the question arises as to what laws we consider when

⁹As said by Neal in his article, "Baker v. Carr: Politics in Search of Law," published in the 1962 Supreme Court Review, 252, 277: "... the principle of districting within each such unit reflects our conviction that the general interest, and the innumerable separate interests of which it is composed, will be better expressed in a medley of voices from minor fractions of the population than by any monolithic majority."

¹⁰U.S. Const. Art. IV, § 4.

evaluating the equality of protection. In *Baker v. Carr* a non compliance with state constitutional provisions was present. We have no need to consider whether deliberate departure from state law denies equal protection¹¹ because here we are dealing with the state constitution itself and the attacked provisions fall only if they impinge on the Federal Constitution.

We are not concerned here with racial discriminations forbidden by the Fourteenth and Fifteenth Amendments or with discrimination on the ground of sex in violation of the Nineteenth Amendment. If we reject the republican form of government standard as a basis for judicial action, we are left with the Due Process Clause to support an assertion of denial of equal protection upon the theory that unequal representation denies equal protection because minority process is not due process.¹²

For all practical purposes the Supreme Court has foregone the application of the Due Process Clause in substantive matters unless an impingement on some absolute civil right occurs.¹³ Although the right of franchise is "a fundamental political right, because preservative of all rights,"¹⁴ no provision of the Federal Constitution of which we are aware makes it an absolute right or forbids apportionment of a state legislature on a basis other than one-man, one-vote. *Baker v. Carr* speaks in terms of "rationality" and "invidious discrimination." The use

¹¹See *Snowden v. Hughes*, 321 U.S. 1, 11.

¹²Dixon, "Legislative Apportionment and the Federal Constitution," *Law and Contemporary Problems*, Vol. XXVII, No. 3, 329, 383.

¹³See *Ferguson, Attorney General of Kansas, v. Skrupa*, 372 U.S. 726, 731, wherein the Court refers to the abandonment of the Due process Clause "to nullify laws which a majority of the Court believed to be economically unwise."

¹⁴*Yick Wo v. Hopkins, Sheriff*, 118 U.S. 356, 370.

of these terms precludes the existence of an absolute right.

If either the Equal Protection Clause or the Due Process Clause or both require absolute majority action, some drastic governmental changes will be necessary. "Every device that limits the power of a majority is, in effect, a means of giving disproportionate representation to the minority."¹⁵ The problem is compounded in the situation with which we are concerned. With full operation of the one-man, one-vote principle, the Colorado electorate by an overwhelming majority approved a constitutional amendment creating a Senate, the membership of which is not apportioned on a strict population basis. By majority process the voters have said that minority process in the Senate is what they want. A rejection of their choice is a denial of the will of the majority. If the majority becomes dissatisfied with that which it has created, it can make a change at an election in which each vote counts the same as every other vote.

A test for determination of equal protection in apportionment cases might logically be better based on the concept of a republican form of government than on the uncertainties, vagueness, and subjective implications of due process. Whichever route is taken the journey ends at the same destination, the necessity of deciding whether the Federal Constitution requires equality of population

¹⁵Quoted from Neal, supra, p. 281. Neal says further: "A constitutional principle that puts unequal districting in doubt also calls into question, by necessary implication, provisions requiring special majorities for particular kinds of legislation, such as approval of bond issues, in municipal referenda or adoption of proposed constitutional amendments by legislatures or passages of legislation over an executive veto. Why should it not reach, as well, other procedural rules or devices that give obstructive power to minorities, such as the filibuster or the seniority system for choosing committee chairmen?"

within representation districts for each house of a bicameral state legislature. We believe that the question must be answered in the negative.

The concept of equality of representation is without historical support.¹⁶ Supreme Court precedents indicate that it is not required.¹⁷ Four, and perhaps five, of the Justices sitting in *Baker v. Carr* reject the idea.¹⁸ A heavy majority of the state and lower federal courts has declined to accept the "practical equality standard" as a require-

¹⁶See the historical material in the dissent of Justice Frankfurter in *Baker v. Carr*, 369 U.S. 186, at 301-324, and the opinion of Judge Edwards in *Scholle v. Hare*, 360 Mich. 1, at 85, 104 N.W. 2nd 63, at 107, vacated and remanded 369 U.S. 429, on remand 367 Mich. 176, 116 N.W. 2nd 350, petition for certiorari filed October 15, 1962, 31 Law Week 3147.

¹⁷*E.g.* *MacDougall v. Green*, Governor of Illinois, 335 U.S. 281, where the Court said: "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government." (p. 283) In *Norvell v. State of Illinois*, _____ U.S. _____, decided May 27, 1963, a case relating to the right of an indigent to a trial transcript at state expense, the Court, after quoting from *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70, a statement that the problems of government are practical ones which may justify if not require rough accommodations, said: "The 'rough accommodations' made by government do not violate the Equal Protection Clause of the Fourteenth Amendment unless the lines drawn are 'hostile or invidious.'"

¹⁸See concurring opinion of Justice Clark (369 U.S. 186) at p. 252, concurring opinion of Justice Stewart at pp. 265-266, and separate dissenting opinions of Justices Frankfurter and Harlan. Justice Douglas said in his concurring opinion at pp. 244-245: "Universal equality is not the test; there is room for weighting."

ment inherent in the Equal Protection Clause.¹⁹ By the admission of states into the Union with constitutions creating bicameral legislatures, membership to which is not apportioned on a population basis, Congress has rejected the principle of equal representation as a constitutional requirement.²⁰ The decision in *Gray v. Sanders*, 372 U.S. 368, is not contrary because there the Court was not concerned with any limitation on "the authority of a State Legislature in designing the geographical districts from which representatives are chosen * * * for the State

¹⁹*Sobel v. Adams*, S.D. Fla., 208 F. Supp. 316, 321, 323, 214 F. Supp. 811; *Thigpen v. Meyers*, W.D. Wash., 211 F. Supp. 826, 831; *Sims v. Frink*, M.D. Ala., 205 F. Supp. 245, 208 F. Supp. 431, 439, probable jurisdiction noted June 10, 1963, —U.S.—; *W.M.C.A., Inc. v. Simon*, S.D.N.Y., 208 F. Supp. 368, 379, probable jurisdiction noted June 10, 1963, —U.S.—; *Baker v. Carr*, M.D. Tenn., 206 F. Supp. 341, 345; *Mann v. Davis*, E.D. Va., 213 F. Supp. 577, 584, Probable jurisdiction noted June 10, 1963, —U.S.—; *Toombs v. Fortson*, N.D. Ga., 205 F. Supp. 248, 257; *Davis v. Synhorst*, S.D. Iowa, —F. Supp.—, 31 Law Week 2587; *Nolan v. Rhodes*, S.D. Ohio, —F. Supp.—, 31 Law Week 2641; *Lund v. Mathas*, 145, So. 2nd 871, 873 (Fla.); *Caesar v. Williams*, 371 P. 2nd 241, 247-249 (Idaho); *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656, 667-669, 229 Md. 317, 182 A. 2nd 877, 229 Md. 406, 184 A. 2d 715, 718, probable jurisdiction noted June 10, 1963, —U.S.—; *Levitt v. Maynard*, 182 A. 2n 897 (N.H.); *Jackman v. Bodine*, 78 N.J. Super. 414, 188 A. 2d 842, 651; *Sweeney v. Notte*, 183 A. 2d 296, 301-302 (R.I.); and *Mikell v. Rousseau*, 183 A.2d 817 (Vt.).

See Israel, "The Future of *Baker v. Carr*," 61 Mich. L. Rev. 107, 117, which notes as exceptions to the majority rule only *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350, petition for certiorari filed, 31 Law Week 3147 (Oct. 15, 1962), and *Moss v. Burkhardt*, W.D. Okla., 207 F. Supp. 885, appeal dismissed —U.S.—, June 10, 1963. The inclusion of *Moss v. Burkhardt* as an exception is of doubtful propriety because the court there was concerned with specific provisions of the Oklahoma constitution. *Sincock v. Duffy*, D. Del., 215 F. Supp. 169, presented a question of severability and the peculiar factual situation in Delaware. The majority of the court said that the House must be based strictly on population and the Senate "substantially on population." 215 F. Supp. at 195.

²⁰The constitutions of Alaska and Hawaii do not require equality of representation in each chamber of the legislature. In admitting these states Congress found the constitution of each "to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence." See Act of July 7, 1958, 72 Stat. 339, and Act of March 18, 1959, 73 Stat. 4.

Legislature * * * ²¹ The references in *Gray v. Sanders* to one-person, one-vote are not pertinent because the Court was considering an electoral system whereby votes for officers elected from a state-wide constituency were weighted differently.

Our conclusion that nothing in the Constitution of the United States requires a state legislature to be apportioned on a strict population basis does not dispose of the problem. The issue remains as to the permissible deviation from a per capita basis. Speaking in terms long applicable to equal protection cases, the Court suggested in *Baker v. Carr* that an apportionment of membership in a state legislature must be "rational" and not "invidiously discriminatory." The issue is narrowed in the cases at bar because, under Amendment No. 7, the lower chamber of the Colorado legislature is apportioned on a population basis. The question is the effect of the failure to apportion the upper chamber on the same basis. A discussion of this matter necessitates a return to the facts.

The cases now before the court do not present the issues as they existed prior to the apportionment made by Amendment No. 7. As noted by our opinion in *Lisco v. McNichols*, 208 F. Supp. 471, 477, the then-existing disparities in each chamber were severe, the defendants presented no evidence to sustain the rationality of the apportionment, and witnesses for the intervenors, while defending the apportionment of the Senate, recognized the malapportionment of the House. The change by Amendment No. 7 was such as to require a trial de novo and we are concerned with the facts as finally presented.

²¹372 U.S. 368, 376, and see concurring opinion of Justice Stewart at pp. 381-382.

In Colorado the problem of districting the state for the election of members of the legislature and of apportioning legislators to those districts requires consideration of the state's heterogeneous characteristics. The politically determined boundaries of Colorado created a state which is not an economically or geographically homogeneous unit. The topography of the state is probably the most significant contributor to the diversity.

Colorado has an area of 104,247 square miles which is almost equally divided between high plains in the east and rugged mountains in the west. It has an average altitude of 6800 feet above sea level and some 1500 peaks which rise to 10,000 feet or more. The Continental Divide crosses the state in a meandering line from north to south.

In the eastern half of the state are high plains crossed by two major river systems, the South Platte and the Arkansas. The western half is a mountainous area drained principally by the Rio Grande and by the Colorado River and its tributaries. Major mountain ranges lie east of the Continental Divide in some sections of the state and have foothill areas of varying breadth separating the high peaks from the high plains.

Geographically the state is divided into many regions with transportation difficulties of varying severity. The high plains are crossed from east to west by several railroads and main highways. The only north to south rail system and main highway system in this area lie just east of the foothills. The western part of the state is separated into many segments by mountain ranges and deep canyons. One main-line railroad crosses this section from east to west and none from north to south. Four

principal highways provide east to west transportation by crossing the ranges at passes having altitudes of 9,000 to 12,000 feet. The north to south highways are less adequate and follow indirect routes. The terrain of the western section is such that some communities only a few miles apart on the map are many miles apart by the shortest useable road. Commercial air transportation between other than the metropolitan centers is limited.

Colorado is further divided by the availability of water supply. The state is largely semi-arid with only isolated mountain areas having an annual precipitation of over 20 inches. That part of Colorado west of the Continental Divide has 37% of the total state land area and 69% of the state's surface water yield. The part east of the Continental Divide has 63% of the land area and 31% of the surface water supplies.²² Conflicts over the use of water have troubled the state continuously since its admission to the Union. The growth of the metropolitan areas would have been impossible without the trans-mountain diversion of water from the Colorado River and its tributaries. The divisive nature of the problem and the need for a state-wide water policy resulted in the creation of the Colorado Water Conservation Board,²³ the members of which are chosen geographically by drainage basins. This recognition of the diverse interests of the competing areas has enabled Colorado to develop impressive irrigation and hydroelectric power projects.²⁴

The 1960 Federal Census gave Colorado a population of 1,753,947 persons. The population is concentrated heavily along the eastern edge of the foothills from Fort

²²Colorado Year Book, 1959-1961, p. 451.

²³Colo. Rev. Stat. Ann., 1953, §§148-1-1 to 148-1-19.

²⁴Colorado Year Book, supra, pp. 459-462.

Collins on the north to Pueblo on the south. In this relatively narrow strip are located three Standard Metropolitan Statistical Areas as defined by the Census Bureau.²⁵

The metropolitan areas and their populations are: Denver (Adams, Arapahoe, Boulder, Denver and Jefferson Counties) - 929,383; Colorado Springs (El Paso County) - 143,742; Pueblo (Pueblo County) - 118,707.

Expert research economists testifying for the defendants divided the state into four regions, Western, Eastern, South Central and East Slope. The Western Region includes those counties west of the Continental Divide and those east of the Divide and entirely within the Front Range of mountains. The area is largely mountainous with wide fluctuations in elevation, precipitation and temperature. About two-thirds of the population live in communities of less than 2,500 inhabitants or on farms. Over 65% of the area is in some form of government ownership. The major industries are agriculture (principally livestock raising), mining, and tourism.

The Eastern Region is a part of the Great Plains. The area is dominated by agriculture with winter wheat the principal crop. Irrigation in the South Platte and Arkansas Valleys produces specialized crops. Livestock raising and feeding are important activities. There is some oil production.

²⁵So far as pertinent the Census Bureau defines a Standard Metropolitan Statistical Area as: "a county or group of contiguous counties which contains at least one city of 50,000 inhabitants or more or 'twin cities' with a combined population of at least 50,000. In addition to the county, or counties, containing such a city or cities, contiguous counties are included in an SMSA if, according to certain criteria, they are essentially metropolitan in character and are socially and economically integrated with the central city. The criteria followed in the delineation of SMSA's relate to a city, or cities, of sufficient population size to constitute the central city and to the economic and social relationships with contiguous counties that are metropolitan in character."

The South Central Region includes Huerfano and Las Animas Counties and the six counties drained by the Rio Grande. Agriculture (principally potato raising and livestock) and coal mining are the main industries.

The East Slope Region includes the strip of counties from Larimer and Weld on the north through Pueblo on the south. The population is highly urbanized with 86.7% living in urban areas. The economy is diversified with manufacturing, agricultural production, mining, tourism, and trade and services contributing to the wealth of the area.

The state is divided into 63 counties, the boundaries of which have remained substantially unchanged since 1913. Historically, contiguous counties have been grouped into representation districts in accordance with a general pattern which is distinguishable since the early days of statehood. Geographical divisions such as mountain ranges and river basins, accessibility, homogeneity, and population all have been recognized. The apportionment of membership to the districts has varied with shifts in population. In the early days of statehood the mining counties were heavily populated. After the turn of the century the increased population of the agricultural counties in the high plains and the decline of the mining counties required changes in apportionment. In more recent years the growth of metropolitan areas has caused a demand for greater representation of the urban centers in the legislature.

Apportionment of the Colorado legislature has not remained static. Legislative revisions occurred in 1881, 1891, 1901, 1909, 1913, and 1953. In 1910, Colorado

adopted a liberal constitutional provision for the initiative and referendum of both "laws and amendments to the constitution."²⁶ An initiated reapportionment law was passed its own reapportionment law and the conflict between it and the initiated measure went to the Colorado Supreme Court,²⁷ which upheld the power of the people to adopt the initiated reapportionment measure, sustained the validity of the initiated reapportionment, and declared the legislative act unconstitutional. In 1954 the voters rejected a referred apportionment measure and in 1956 rejected an initiated constitutional amendment proposing the reapportionment of both chambers of the legislature on a straight population basis.²⁸

After the defeat of the 1956 proposal the Governor appointed a commission to study reapportionment. The majority favored action similar to Amendment No. 7 and the minority recommended action substantially the same as the 1956 proposal and Amendment No. 8. Attempts of the legislature to agree on a reapportionment measure failed. An effort to compel apportionment by state court action failed.²⁹ During the spring of 1962 Amendments 7 and 8 were initiated by petition. Intensive campaigns

²⁶Colo. Const. Art. V, § 1. A constitutional amendment may be initiated by petition of 8% of the legal voters. No geographical distribution of petition signers is required.

²⁷Colo. S. L. 1933, Ch. 157, p. 811.

²⁸Armstrong v. Mitten, 95 Colo. 425, 37 P.2d 757.

²⁹The vote in 1954 was 159,188 against and 116,695 for. The proposal lost in every county. The vote in 1956 was 349,195 against and 158,294 for. The proposal lost in every county except Denver.

³⁰In re Legislative Reapportionment, Colo., 374 P.2d 66.

were waged in support of each.³¹ The voters adopted Amendment No. 7 and rejected Amendment No. 8.³²

The choice of the voters is now before the court. By their action they have apportioned the House on a population basis and have recognized other factors in the apportionment of the Senate. Consideration must next be given to the deviations from equality of representation which occur in the apportionment of the Senate.

Appendix C following this opinion contains tables giving, for each of the four regions delineated by the defense experts, the senatorial apportionment under Amendment No. 7, listing constituent counties, the area in square miles, the population, the apportionment of senators and population per senator.

The tables disclose that in the Western Region there are eight senatorial districts to which are apportioned

³¹The witness Edwin C. Johnson, three times Governor and three times United States Senator from Colorado, was one of the sponsors of Amendment No. 7. After mentioning the fact that No. 7 carried in every county and No. 8 lost in every county, he said: "It is very unusual in the annals of Colorado politics that any proposal or candidate receive a plurality in each and every county of this diverse state. Especially as to ballot proposals, there is normally a large built-in negative vote. If people do not understand a proposal, they vote 'no'. I believe that the principal reason for the character of the vote on Amendment 7 is that the issues were very clearly defined, not only by the continuous activities above described from 1953 through 1962, but also in the campaign itself. The proponents of each amendment were highly organized, and they conducted a campaign in every nook and crannie of the state. . . . In addition both proposals were heavily advertised, pro and con, and were the subject of front page editorial treatments by the newspapers of the state. Every communication medium was filled with discussion of this issue for months prior to election day. In short, in these campaigns, the people were intensely interested, fully informed and voted accordingly."

³²Amendment No. 7 was adopted by a vote of 305,700 to 172,725 (63.89% for and 36.11% against), and carried in every county of the state. Amendment No. 8 lost by a vote of 311,749 to 149,822 (67.54% against and 32.46% for), and was defeated in every county of the state.

eight senators. This region has 13% of the state population, 45.47% of the state area and 20.5% of the senators. There is one senator for each 28,480 persons.

The Eastern Region contains five senatorial districts, to which are apportioned five senators. The region has 8.1% of the state population, 26.21% of the state area and 12.8% of the senators. There is one senator for each 28,407 persons.

The South Central Region contains three senatorial districts, to which are apportioned three senators. The region has 3.8% of the state population, 13.99% of the state area and 7.7% of the Senate membership. There is one senator for each 22,185 persons.

The East Slope Region contains twenty-three senatorial districts, to which are apportioned twenty-three senators. The region has 75.1% of the state population, 14.33% of the state area, and 59.0% of the Senate membership. There is one senator for each 57,283 persons.

The three metropolitan areas of the state have a combined population of 1,191,832 persons or 67.95% of the state total and elect twenty or a majority of the thirty-nine senators. The Denver Metropolitan Area has a population of 929,383 persons or 52.99% of the state total and elects sixteen senators. The City and County of Denver, the central portion of the Denver Metropolitan Area, is allotted eight senators. The suburban portion (Adams, Arapahoe, Boulder, and Jefferson Counties) of the same area is allotted a total of eight senators.

The combination of districts which would result in

the election of a majority of the Senate by the smallest population is reached by taking Boulder County out of the Denver Metropolitan Area and adding it to the non-metropolitan areas. This would result in a population of 636,369 persons or 36.28% of the state total electing a majority of the Senate.

Appendix D to this opinion gives the ratio of the population per senator in each district to the population of the district having the least number of persons represented by a senator. The highest ratio, that of Districts Nos. 11 and 12 over District No. 23, is 3.6 to 1.

The heterogeneous characteristics of Colorado justify geographic districting for the election of the members of one chamber of the legislature. In no other way may representation be afforded to insular minorities. Without such districting the metropolitan areas could theoretically, and no doubt practically, dominate both chambers of the legislature.

The plaintiffs make much of the disparities in senatorial representation which vary downward from 3.6 to 1. They say that the deviations from per capita standards are impermissible. We do not agree. The distributive scheme of Amendment No. 7 may not be perfect but it does recognize the geographic diversities, the historic grouping of counties, and the accessibility of a candidate to the voters and of a senator to his constituents. The realities of topographic conditions with their resulting effect on population may not be ignored. For an example, if the contention of the plaintiffs was to be accepted, Colorado would have one senator for approximately every 45,000 persons. Two contiguous Western Region senator-

ial districts, Nos. 29 and 37, have a combined population of 51,675 persons inhabiting an area of 20,514 square miles.³³ The division of this area into two districts does not offend any constitutional provisions. Rather, it is a wise recognition of the practicalities of life. An analysis of the other senatorial districts in all the regions except the populous East Slope would merely emphasize the point.

We are convinced that the apportionment of the Senate by Amendment No. 7 recognizes population as a prime, but not controlling, factor and gives effect to such important considerations as geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, conformity to historical divisions such as county lines and prior representation districts, and "a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses."³⁴

The plaintiffs rest their cases on the argument that the apportionment of the Senate by Amendment No. 7 is arbitrary, invidiously discriminatory, and without any rationality. The voters of Colorado have themselves answered these charges. By adopting Amendment No. 7 and by rejecting Amendment No. 8, which proposed to apportion the legislature on a per capita basis, the electorate has made its choice between the conflicting principles.

The initiative gives the people of a state no power

³³Each of nine states, Rhode Island, Delaware, Connecticut, Hawaii, New Jersey, Massachusetts, New Hampshire, Vermont, and Maryland contains less area.

³⁴W.M.C.A., Inc. v. Simon, S.D.N.Y., 208 F.Supp. 368, 379, probable jurisdiction noted U.S., June 10, 1963. See also Mann v. Davis, E.D.Va., 213 F.Supp. 577, 584, probable jurisdiction noted, U.S., June 10, 1963.

to adopt a constitutional amendment which violates the Federal Constitution. Amendment No. 7 is not valid just because the people voted for it. If the republican form of government principle is not a useable standard because it poses political rather than judicial questions, the observation is still pertinent that Amendment No. 7 does not offend such principle. If the true test is the denial of equal right to due process, we face the traditional and recognized criteria of equal protection. These are arbitrariness, discrimination, and lack of rationality. The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary.

The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. At the most they present a political issue which they lost. On the questions before us we shall not substitute any views which we may have for the decision of the electorate. In *Ferguson, Attorney General of Kansas, v. Skrupa*, 372 U.S. 726, 731, the Supreme Court said that it refused to sit as a "super-legislature to weigh the wisdom of legislation."³⁵ Similarly, we decline to act as a superelectorate to weigh the rationality of a method of legislative apportionment adopted by a decisive vote of the people.

³⁵Quoted from *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423.

We believe that no constitutional question arises as to the actual, substantive nature of apportionment if the popular will has expressed itself.³⁶ In *Baker v. Carr* the situation was such that an adequate expression of the popular view was impossible. In Colorado the liberal provisions for initiation of constitutional amendments permit the people to act — and they have done so. If they become dissatisfied with what they have done, a workable method of change is available. The people are free, within the framework of the Federal Constitution, to establish the governmental forms which they desire and when they have acted the courts should not enter the political wars to determine the rationality of such action.

Each case is dismissed and all parties shall bear their own costs. The findings of Fact and Conclusions of Law of the court are set out in this opinion as permitted by Rule 52(a), F.R.Civ.P. The clerk will forthwith prepare and submit an appropriate form of judgement.

DONE at Denver, Colorado, this day of July, 1963.

BY THE COURT

Jean S. Breitenstein
United States Circuit Judge,
Tenth Circuit

Alfred A. Arraj
Chief Judge, United States
District Court

³⁶See McCloskey, "The Reapportionment Case," 76 Harvard Law Review 54, 71-72.

APPENDIX A

INITIATED AMENDMENT No. 7 — 1962 Colo. Gen. Election

“SECTION 1. Sections 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47 and 48 of Article V are adopted, to read as follows:

“Sections 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

“SECTION 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

“Section 47. SENATE. The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more

than one senator, senatorial districts shall be as nearly equal in population as may be.

“Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Section 45, 46 and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be as provided by law.”

APPENDIX B

INITIATED AMENDMENT No. 8 — 1962 Colo. Gen. Election

“Sections 45 and 47, Article V, of the Constitution of the State of Colorado, are hereby amended to read as follows:

“Section 45. APPORTIONMENT BY COMMIS-

SION. (A) There shall be established a Commission for Legislative Apportionment composed of three members who shall be qualified electors of the State of Colorado, no more than two of whom shall be of the same political party, to serve for a term of eighteen months from the time of their appointment. One member shall be appointed by each of the following in this order: by the Attorney General prior to June 1, by the Lieutenant Governor prior to June 15 and by the State Board of Education prior to July 1, of each year of appointment. The appointments shall be made prior to July 1, 1963, July 1, 1971, and July 1 of each tenth year thereafter.

“(B) It shall be the duty of the commission to delineate senatorial and representative districts and to revise and adjust the apportionment of senators and representatives among such districts. The commission shall certify to the Colorado Supreme Court the boundaries of the senatorial and representative districts and the reapportionment of senators and representatives on or before January 2, 1964; January 2, 1972, and January 2 of each tenth year thereafter.

“(C) If such delineation and apportionment conforms to the requirements of sections 45 through 47 of this article, the court shall affirm the same. If such delineation and apportionment does not conform to the said requirements, or if for any reason whatever the same is not certified to the court, then the court shall delineate senatorial and representative districts and adjust the apportionment among such districts. The court shall rule on or before April 15 of each year set forth in paragraph 1 to become effective on the date of the court's ruling. (B) of this section, with such districting and apportion-

The court shall notify forthwith the secretary of state and the clerk of each county of its ruling.

“(D) The commission shall determine a strict population ratio for the senate and for the house by dividing the total state population as set forth in each decennial United States Census by the number of seats assigned to the senate and house, respectively. No legislative district shall contain a population per senator or representative of $33\frac{1}{3}\%$ more or less than the strict population ratio, except mountainous senatorial districts of more than 5,500 square miles, where the major portion of the district lies west of the 28th meridian of longitude west from Washington, D.C., but no such senatorial district shall contain a population of less than 50% of the strict population ratio.

“(E) It is the intent that sparsely populated areas shall have maximum representation within the limits set forth in paragraph (D) and that population per legislator in densely populated areas shall be as nearly equal as possible.

“Section 47. SENATORIAL AND REPRESENTATIVE DISTRICTS. (A) Senatorial districts may consist of one county or two or more contiguous counties but no county shall be divided in the formation of a senatorial district.

“(B) Representative districts may consist of one county or two or more contiguous counties; except that any county which is apportioned two or more representatives may be divided into representative sub-districts; provided, that, a majority of the voters of that county

approve in a general election the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large

“(C) Any proposal to divide a county into subdistricts shall be placed on the ballot only by initiative petition filed with the secretary of state according to the requirements set forth for statewide initiated measures in Article V, Section 1, of this constitution and statutes enacted thereunder; Provided, that, the requirements for the number of signatures and publication shall be determined for that county instead of for the state.

“(D) Subdistricting measures may be placed on the ballot at the general elections of 1966, 1974, and at the general elections held each tenth year thereafter and at no other times. Any such measure shall take effect pursuant to the provisions of Article V, Section 1, of this constitution and shall remain in effect until repealed or revised by the people through another initiated measure, except that when the apportionment of representatives to any subdistricted county is increased or decreased by the commission for legislative apportionment, the commission may, subject to the review provided in Section 45, paragraph (C), of this article, amend the subdistricting in said county as necessary to conform to the new apportionment.

“(E) A candidate for representative in any subdistricted county need not reside in the subdistrict in which he is a candidate.

“(F) No part of any county may be combined with another county or part of another county in the formation of any senatorial or representative district.”

APPENDIX C

APORTIONMENT OF THE SENATE BY AMENDMENT NO. 7

(Grouped by Regions)

Sen. Dist.	Counties	Square Miles	Population	Senators	Population Per Senator
WESTERN REGION					
24	Chaffee	1,040	8,298		
	Park	2,178	1,822		
	Gilpin	149	685		
	Clear Creek	395	2,793		
	Douglas**	844	4,816		
	Teller	555	2,495		
		5,161	20,909	1	20,909
25	Fremont	1,562	20,196		
	Custer	738	1,305		
		2,300	21,501	1	21,501
27	Delta	1,161	15,602		
	Gunnison	3,243	5,477		
	Hinsdale	1,062	208		
		5,466	21,287	1	21,287

*The districts are numbered as in H.B. 65. Before the adoption of Amendment No. 7, the state was divided into 25 senatorial districts by Colo. Rev. Stat. Ann. § 63-1-3 (1953), and 35 senators were apportioned to those districts. Amendment No. 7 retained the same district boundaries except that Elbert County was removed from the district which included Arapahoe County also and was added to the district previously consisting of Kit Carson, Cheyenne, Lincoln, and Kiowa Counties. Arapahoe was left in a district by itself. The membership in the Senate was increased to 39 by apportioning one additional senator each to the suburban counties of the Denver Metropolitan Area, that is, Adams, Arapahoe, Boulder and Jefferson Counties. Counties apportioned more than one senator were to be divided by the legislature into senatorial districts as nearly equal as may be in population. This division was made by H.B. 65. The action so taken is not at issue in these cases.

**Douglas County is a part of the East Slope Region, but because of its peculiarities is joined with five Western Region counties to form a senatorial district.

Sen. Dists.	Counties	Square Miles	Population	Senators	Population Per Senator
(WESTERN REGION—cont.)					
29	Rio Blanco	3,264	5,150		
	Moffat	4,761	7,061		
	Routt	2,331	5,900		
	Jackson	1,628	1,758		
	Grand	1,869	3,557		
		13,853	23,426	1	23,426
32	Mesa	3,334	50,715	1	50,715
33	Montrose	2,240	18,286		
	Ouray	540	1,601		
	San Miguel	1,284	2,944		
	Dolores	1,029	2,196		
		5,093	25,027	1	25,027
35	San Juan	392	849		
	Montezuma	2,097	14,024		
	La Plata	1,691	19,225		
	Archuleta	1,364	2,629		
		5,544	36,727	1	36,727
37	Garfield	3,000	12,017		
	Summit	616	12,073	1	
	Eagle	1,686	4,677		
	Lake	384	7,101		
	Pitkin	975	2,381		
		6,661	28,249	1	28,249
	Western Region (8 Districts, (30 Counties)	47,412	227,841	8	28,480

EASTERN REGION

28	Logan	1,849	20,302		
	Sedgwick	554	4,242		
	Phillips	680	4,440		
		3,083	28,984	1	28,984

Sen. Dist.	Counties	Square Miles	Population	Senators	Population Per Senator
(EASTERN REGION—cont.)					
34	Kit Carson	2,171	6,957		
	Cheyenne	1,772	2,789		
	Lincoln	2,593	5,310		
	Kiowa	1,794	2,425		
	Elbert	1,864	3,708		
		10,194	21,189	1	21,189
36	Yuma	2,383	8,912		
	Washington	2,530	6,625		
	Morgan	1,300	21,192		
		6,213	36,729	1	36,729
38	Otero	1,276	24,128		
	Crowley	812	3,978		
		2,088	28,106	1	28,106
39	Bent	1,543	7,419		
	Prowers	1,636	13,296		
	Baca	2,565	6,310		
		5,744	27,025	1	27,025
	Eastern Region (5 Districts.) (16 Counties)	27,322	142,033	5	28,407

SOUTH CENTRAL REGION

23	Las Animas	4,798	19,983	1	19,983
30	Huerfano	1,580	7,867		
	Costilla	1,220	4,219		
	Alamosa	723	10,000		
		3,523	22,086	1	22,086

Sen. Dist.	Counties	Square Miles	Population	Senators	Population Per Senator
(SOUTH CENTRAL REGION—cont.)					
31	Saguache	3,146	4,473		
	Mineral	923	424		
	Rio Grande	916	11,160		
	Conejos	1,274	8,428		
		6,259	24,485	1	24,485
	South Central (3 Districts, (8 Counties)	14,580	66,554	3	22,185

EAST SLOPE REGION

1-8	Denver	73	493,887	8	61,736
9-10	Pueblo	2,414	118,707	2	59,353
11-12	El Paso	2,159	143,742	2	71,871
13-14	Boulder	758	74,254	2	37,127
15-16	Weld	4,033	72,344	2	36,172
21-22	Jefferson	791	127,520	2	63,760
26	Larimer	2,640	53,343	1	53,343
19-20	Arapahoe	815	113,426	2	56,713
17-18	Adams	1,250	120,296	2	60,148
	East Slope (23 Districts, (9 Counties)	14,933	1,317,519	23	57,283

Areas	Square Miles	Population	Senators	Population Per Senator
Colorado (39 Districts, (63 Counties)	104,247	1,753,947	39	44,973
Denver Metropolitan Area (Denver, Boulder, Jefferson, Arapahoe and Adams Counties) (16 Districts, (5 Counties)	3,687	929,383	16	58,086
All Standard Metro- politan Statistical Areas ("Denver"— Adams, Arapahoe, Boulder, Denver and Jefferson Counties; "Colorado Springs"—El Paso County; and "Pueblo"— Pueblo County) (20 Districts) (7 Counties)	8,260	1,191,832	20	59,592

APPENDIX D

RATIO OF POPULATION PER SENATOR IN EACH DISTRICT TO THE POPULATION OF THE DISTRICT HAVING THE LEAST NUMBER OF PERSONS REPRESENTED BY A SENATOR

(Grouped by Regions)

District	Population Per Senator	Least Population Per Senator	Ratio
WESTERN REGION			
24	20,909	19,983	1.0-1
25	21,501	19,983	1.1-1
27	21,287	19,983	1.1-1
29	23,426	19,983	1.2-1
32	50,715	19,983	2.5-1
33	25,027	19,983	1.3-1
35	36,727	19,983	1.8-1
37	28,249	19,983	1.4-1

EASTERN REGION

28	28,984	19,983	1.5-1
34	21,189	19,983	1.1-1
36	36,729	19,983	1.8-1
38	28,106	19,983	1.4-1
39	27,025	19,983	1.4-1

SOUTH CENTRAL REGION

23	19,983	19,983	1.1-1
30	22,086	19,983	1.1-1
31	24,485	19,983	1.2-1

District	Population Per Senator	Least Population Per Senator	Ratio
EAST SLOPE REGION			
1-8	61,736	19,983	3.1-1
9-10	59,353	19,983	3.0-1
11-12	71,871	19,983	3.6-1
13-14	37,127	19,983	1.9-1
15-16	36,172	19,983	1.8-1
21-22	63,760	19,983	3.2-1
26	53,343	19,983	2.7-1
19-20	56,713	19,983	2.8-1
17-18	60,148	19,983	3.0-1

Appendix B(1)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 7501

ARCHIE L. LISCO, and all other registered voters of the Denver Metropolitan Area, State of Colorado, similarly situated,

Plaintiffs,

v.

JOHN LOVE, as Governor of the State of Colorado, **HOMER BEDFORD**, as Treasurer of the State of Colorado, **Byron Anderson**, as Secretary of the State of Colorado, **THE STATE OF COLORADO** and **THE FORTY-FOURTH GENERAL ASSEMBLY THEREOF**,

Defendants.

Civil Action No. 7637

WILLIAM E. MYRICK, **JOHN CHRISTENSEN**, **ED SCOTT**, **GORDON TAYLOR**, **HENRY ALLARD**, **ANDRES LUCAS**, **JOHN L. KANE**, **WILLIAM J. WELLS**, **FRANK A. CARLSON**, **WILLIAM EPPINGER**, **ALLEN L. WILLIAMS**, **RUTH S. STOCKTON**, **KENNETH FENWICK**, **CHESTER HOSKINSON**, and **JOE B. LEWIS**, individually and as citizens of the State of Colorado, residents in the Counties of Adams, Arapahoe, and Jefferson, and taxpayers and voters in the State of Colorado, for themselves and for all other persons similarly situated,

Plaintiffs,

v.

THE FORTY-FOURTH GENERAL ASSEMBLY of the State of Colorado, **JOHN LOVE**, as Governor of the State of Colorado, **HOMER BEDFORD**, as Treasurer of the State of Colorado, and **BYRON ANDERSON**, as Secretary of State of the State of Colorado,

Defendants.

Civil Actions No. 7501 and No. 7637

EDWIN C. JOHNSON, **JOHN C. VIVIAN**, **JOSEPH F. LITTLE**, **WARWICK DOWNING**, and **WILBUR M. ALTER**, individually and as citizens, residents and taxpayers of the State of Colorado, on behalf of themselves and for all persons similarly situated,

Interveners.

Filed United States District Court, Denver, Colorado July 16, 1963
G. Walter Bowman, Clerk

Francis R. Salazar and Carl Harthun, Attorneys at Law, 304 Denver-U. S. National Center, 1700 Broadway, Denver 2, Colorado, for Plaintiffs in Civil Action No. 7501.

George Louis Creamer and Charles Ginsberg, Attorneys at Law, 928 Equitable Building, Denver 2, Colorado, for Plaintiffs in Civil Action No. 7637.

Honorable Duke W. Dunbar, Attorney General for the State of Colorado, Richard W. Bangert, Assistant Attorney General for the State of Colorado, 104 State Capitol, Denver 2, Colorado; Anthony F. Zarlengo and V. G. Seavy, Jr., Attorneys at Law, 630 Majestic Building, Denver 2, Colorado, for Defendants in Civil Actions No. 7501 and No. 7637.

Richard S. Kitchen, Charles S. Vigil and Harvey Williams, Attorneys at Law, 2155 First National Bank Building, Denver 2, Colorado, for Intervenors in Civil Actions No. 7501 and No. 7637.

Phillip J. Carosell, Attorney at Law, 430 Majestic Building, Denver 2, Colorado, Amicus Curiae in Civil Actions No. 7501 and No. 7637.

Before BREITENSTEIN, Circuit Judge, and ARRAJ and DOYLE, District Judges.

DOYLE, District Judge, dissenting.

Our concern here is not with the desirability as a matter of policy of a Senate which is controlled by a minority of voters, nor are we concerned with the extent of voter approval which resulted in adoption of Amendment No. 7. The issue for determination is whether the disparities described in the majority opinion, which will be further discussed here, are so substantial and irrational as to constitute invidious discrimination so as to violate the equal protection of the laws, Fourteenth Amendment of the Constitution of the United States.

Prior to the adoption of Amendment No. 7, and on August 10, 1962, this Court issued its per curiam opinion recognizing the equal protection clause as the criterion, finding gross disparities and holding the disparities to be of sufficient magnitude to make out a *prima facie* case of invidious discrimination. At the same time final adjudication was postponed pending a further hearing and because of the impendency of the election at which the competing measures were on the ballot. Subsequently, Amendment No. 7 was approved by a majority of the voters of the State. And so, the question is whether the gross disparities — invidious discrimination, was remedied by the adoption of Amendment No. 7; or whether the evidence at the trial showed the existence of a rational basis whereby the discriminations were no longer to be regarded as invidious.

Does Amendment No. 7 remedy the gross and glaring disparity in voting strength which is described and characterized in our prior opinion? Amendment No. 7 provides for a House of Representatives composed of sixty-five members from sixty-five districts which shall be as nearly equal in population as may be. This provision re-

moved the population disparities which existed in the House of Representatives under the old law.¹

In the Senate, Amendment No. 7 declares that the State shall be divided into thirty-nine senatorial districts, one senator from each district. It further declares that the apportionment of senators among the counties shall be the same as now provided by 63-1-3, Colorado Revised Statutes 1953. Four senators are added, or a total of thirty-nine, as compared with thirty-five under the old law, and one each of these additional senators is apportioned to Adams, Arapahoe, Boulder and Jefferson counties. Further, the amendment freezes the apportionment of the various districts except for a provision permitting a review of counties apportioned more than one senator following each federal census. It is thus apparent then that Amendment No. 7, while apportioning the House on a population basis, retains the old system, that which we previously condemned, except that it gives a senator for each of four populous metropolitan counties. It is clear, therefore, that no real effort has been made to cure the disparities which existed under the old law; on the contrary, these disparities are perpetuated by writing them into the Constitution of Colorado, the only relief being somewhat of a reduction of disparity in four of the sixty-three counties in the State.

The ultimate question is, therefore, the second one posed above, which is, whether the defendants and respondents have offered evidence establishing that the disparities are non-invidious.

Although a number of federal courts have now indi-

¹63-1-2, 63-1-6, Colorado Revised Statutes 1953.

cated at least one house must be apportioned on a per capita basis,² there is little authority holding that the upper house may or may not be organized upon a wide disparity of population basis.³ It would appear that there is no logical basis for distinguishing between the lower and the upper house — that the equal protection clause applies to both since no valid analogy can be drawn between the United States Congress and the State. See *Gray v. Sanders*, 83 S. Ct. 801 (1963). —U.S.— So, until there is some authoritative ruling to the contrary, we must assume that equality of voting power is demanded with respect to both houses.

It is to be conceded that the Fourteenth Amendment does not require absolute equality. This is apparent from the opinion of Mr. Justice Douglas;⁴ in other words, some other factors may be taken into account. It would seem, however, that this is in recognition of the fact that perfect exactness as to the number of inhabitants of each electoral district is a practical impossibility.⁵ Beyond this, however, fairness requires that every individual be guaranteed the right to cast an effective vote.⁶

Although the Supreme Court in *Gray v. Sanders*,

²*Toombs v. Fortson*, (D.C. N.D.Ga., 1962) 205 F. Supp. 248; *Baker v. Carr*, (D.C. M.D.Tenn., 1962) 206 F. Supp. 341; *Sims v. Frink*, (D.C. M.D.Ala.N.D. 1962) 205 F. Supp. 245; *Caesar v. Williams*, (Idaho, 1962) 371 P. 2d 241; *Sincock v. Duffy*, (D.C. D.Del., 1963) 215 F. Supp. 169.

³*Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962), holding a statute which gave citizens of one district twice the voting strength of citizens of another district while voting for the State Senate to be invidiously discriminatory. See also *Thigpen v. Meyers*, (D.C. W.D. Wash. N.D. 1962) 211 F. Supp. 826, and *Sincock v. Duffy*, supra.

⁴*Baker v. Carr*, supra.

⁵See, for example, *State v. Sathre*, 113 N.W. 2d 679, (N.Dak. 1962); *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (D.C. W.D. Wis. 1962).

⁶*Moss v. Burkhardt*, 207 F. Supp. 885 (W.D. Okla. 1962); *Thigpen v. Meyers*, supra.

supra, did not have before it the present question, it nevertheless expressed the philosophy of non-dilution of the vote of the individual citizen. It extracted this philosophy not only from the Constitution, but from the history of the United States, and it is to be concluded therefrom that a properly apportioned state legislative body must at least approximate by bona fide attempt the creation of districts substantially related to population. In *Sincock v. Duffy*, 215 F. Supp. 169, it was said:

“Such affirmative action must be rendered possible and, as we have already indicated, an apportionment should not be permitted that would allow a blockage of major legislation desired by the great majority of electors of Delaware to come to pass in the Senate. *Effecting the will of the majority of the people of a State must be deemed to be the foundation of any apportionment plan.* * * * ” (Emphasis supplied)

Even if we assume that the factors which have been given weight in the majority opinion are properly to be considered, nevertheless, the disparities which exist in Amendment No. 7 cannot be rationalized. Criteria such as were applied by the majority here were used in the case of *W.M.C.A. Inc v. Simon* (D.C. So.D. N.Y., 1962), 208 F. Supp. 368. Disparities in the New York law were relatively slight. New York City, for example, having 46 per cent of the state's population, has shown to have had 43.1 per cent of the total number of senators. The ten most populous counties are shown to have had 65.5 percent control of the Senate. The factors approved in *W.M.C.A.*, supra, for determining whether or not invidious discrimination existed, were the following:

“(1) Rationality of state policy and whether or not the system is arbitrary.

“(2) Whether or not the present complexion of the legislature has a historical basis.

“(3) Whether there lies within the electorate of the State of New York any possible remedy (if gross inequalities exist.)

“(4) Geography, including accessibility of legislative representatives to their electors.

“(5) Whether the Court is called upon to invalidate solemnly enacted State Constitutions and laws.” 208 F. Supp. at 374.

Applying these factors, or tests in the present case, produce a result different from that which obtained in *W.M.C.A.*

1. *Rational, or Arbitrary?*

Amendment No. 7 was not adopted upon a basis of recognizing geographic, topographic and economic differences. As shown above, Amendment No. 7 arbitrarily froze existing apportionment and at the same time furnished one additional senator to each of four populous metropolitan counties by writing into the Colorado organic law disparities which had long existed and which we held were gross. It cannot be said that it was irrational. The unpleasant truth is that it was particularly designed and dictated not by factual differences, but rather by political expediency. Simplicity and success at the polls overrode considerations of fairness and justice. Thus, Amendment No. 7 fails the test of rationality in its adoption.

2. *Historic Factors.*

The presence of an historical basis has been persuasive in a number of instances.⁷ We must be mindful of the fact however, that the present rash of reapportionment litigation is the result of an historical fact; namely, that the several states were in the past predominantly rural. The failure of legislative bodies to recognize population shifts and social changes has produced the present problem. So, therefore, the fact that legislative districts have historic significance has little value in determining what constitutes invidious discrimination. This is particularly true in Colorado, the character of which has substantially changed. The language contained in the opinion of the Court in *Toombs v. Fortson* (D.C. N.D. Ga., 1962), 205 F. Supp. 248, is pertinent:

"Applying these historical facts to the test of invidiousness, we are unable to discern any justification for continuing this system merely because it has an historical basis in Georgia's political institutions. This is so, primarily, because while historically the statute and constitutional requirements remain substantially the same, the passage of time and changing living habits of the people have distorted it into something entirely different from what it was at its genesis."

It is difficult to see how history can be of value other than for an explanation of disparities — it can not justify them.

⁷*W.M.C.A. Inc. v. Simon* (D.C. S.D.N.Y., 1962), 208 F. Supp. 368; *Maryland Committee for Fair Representation, et al. v. Tawes*, 229 Md. 406, 184 A. 2d 715 (1962); *Sobel v. Adams*, (D.C. S.D. Fla. 1963) 214 F. Supp. 811.

3. *Alternative Remedies.*

The majority were impressed by the argument that the initiative in Colorado is relatively easy so that the voters could readily change the Constitution if the inequities became oppressive. Here again, it is of little consolation to an individual voter who is being deprived of his rights that he can start a popular movement to change the Constitution. This possible remedy is not merely questionable, it is for practical purposes impossible. This was recognized by the United States District Court for the District of Nebraska in *League of Nebraska Municipalities v. Marsh*, (D.C. D. Nebr., 1962) 209 F. Supp. 189, where it was said:

"To say that such a remedy is adequate for one ordinary voter, and we are here concerned with the rights of an individual voter, for concededly one ordinary voter could maintain this action, is being impractical. In addition, the expense of putting an initiated proposal on the ballot in Nebraska is prohibitive for the ordinary voter."

4. *Geography and Economics.*⁸

Much emphasis is placed on Colorado's heterogeneous topography, sparse settlement of mountainous areas, inaccessibility of some communities, and the great distances as justifying the disproportion. In order to soften the impact resulting from population disparities in the districts, the opinion makes comparisons of various regions

⁸(Although economics have not been considered as a factor in *W.M.C.A. v. Simon*, supra, the majority opinion has stressed it and it is undoubtedly to be considered.)

rather than comparisons of senatorial districts. Such re-alignment is not, of course, valid, but even this approach shows disparities which are gross and glaring. The majority's Western Region has on the average a population of 28,480 per senator as against the South Central's 22,185 and the East Slope's 57,283.⁹ Since disparities of 2-to-1 and 2-1/2-to-1 are sufficiently substantial as to be invidious this glossing, or cloaking and juggling of districts technique fails to camouflage the facts and does not diminish the disproportion. The case could be different if the farmers had developed the scheme of Amendment No. 7 as a preconceived plan — part of good faith effort to balance off these geographic factors. Such is not the case. Instead, Amendment No. 7 is the product of a mechanical and arbitrary freezing accomplished by adoption, with slight modification of the unlawful alignments which had existed in the previous statute.¹⁰

The tendered explanation for a 3.6-to-1 and sometimes 3-to-1, and often 2-to-1 disparity between voting strength on the ground that "in no other way may representation be afforded to insular minorities," carries little weight when considered in the light of modern methods of electronic communication, modern highways, automobiles and airplanes. When a man had to ride on horseback from his constituency to the capital, or to settlements within his district, there might have been valid basis for the geographic factors which are here weighted so heavily. Under the circumstances of the present there can be but little consideration given to this geographic factor. Distances

⁹See Exhibit "C" of the majority opinion.

¹⁰(Cf. *Scholle v. Hare*, supra, wherein the amalgamation of contiguous counties supposedly having similar interests, was without serious regard for population differences between districts. This was condemned.)

as the crow flies now have little relevance in formulating electoral districts.

Economics has also been given great weight by the majority. The practical difficulties in giving effect to economic factors are mentioned in *Moss v. Burkhart*, 207 F. Supp. 885 (appendix). The major difficulty is that the economic institutions in a dynamic society change rapidly. Certain industries such as mining in Colorado, rise and fall in a few short years and political institutions must be devised to withstand the ravages of time and change. It is foolish to say that because an area sustained a substantial mining industry at some previous time, it deserves greater representation today; or, because one area has cattle or a surplus of water, that it deserves greater representation. The folly of this kind of reasoning is at once apparent. Governments are devised to arrange the affairs of men. Economic interests are remarkably well represented without special representation. It is dangerous to build into a political system a favored position for a segment of the population of the state. There exists no practical method of ridding ourselves of them, and long after the institutions pass, the built-in advantage remains even though it is at last only a vestige of the dead past.¹¹

5. *Whether solemnly enacted state laws must be invalidated.*

There is, of course, a presumption of validity which attaches to any enactment, and the presumption is undoubtedly stronger when the law is a constitutional amendment adopted by vote of the people. This presumption

¹¹(See *Moss v. Burkhart*, supra.)

does not, however, have the strength attributed to it by the majority when it says:

“The plaintiffs rest their case on the argument that the apportionment of the Senate by Amendment No. 7 is arbitrary, invidiously discriminatory, and without any rationality. The voters of Colorado have themselves answered these charges. * * *

And again, they say:

“* * * The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. * * *

And finally:

“The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. * * *

The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restraint we can not, true to our oath, uphold such legislation in the face of palpable infringement of rights. Thus, state racial legislation would unquestionably enjoy overwhelming electorate approval in certain of our states, yet not one would argue that this factor could compensate for manifest inequality. It is too clear for argument that constitutional law is not a matter of majority vote.¹² Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are

¹²(*Moss v. Burkhardt*, supra, and *Thigpen v. Meyers*, cited supra.)

to be protected against the will of the majority.¹³ The rights, which are here asserted are the rights of the individual plaintiffs to have their votes counted equally with those of other voters. This factor the majority seems to have lost sight of. The opinion even refuses to recognize that the equal protection clause is the applicable standard when it declares:

“ * * * by majority process the voters have said that minority process in the senate is what they want.”

The opinion in still another place states:

“If we reject the republican form of government standard as a basis for judicial action, we are left with the Due Process Clause to support an assertion of denial of equal protection upon the theory that unequal representation denies equal protection because minority process is not due process.”

This confusion of the equal protection and due process clauses, plus lamenting the fact that the republican form of government is not the test, must be attributed to a desire and a search for a more flexible basis. The fact is that the equal protection and due process clauses of the Fourteenth Amendment are not coextensive and coterminous.¹⁴ The equal protection clause is an independent limitation on state action which is in no way dependent upon the due process clause. It is straightforward and exacting in its requirements that the rights of all citizens shall be equated upon an equal scale under the law: laws

¹³*Baker v. Carr* (D.C. M.D. Tenn., 1962) 206 F. Supp. 341; *Sincock v. Duffy* (D.C. D.Del., 1963) 215 F. Supp. 169; *Brunson v. Board of Trustees of School District No. 1* (D.C. E.D.So. Cal., 1962) 30 F.R.D. 369.

¹⁴*Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693.

which grant preferences are thus repugnant. It is impossible to justify substantial differences between voting rights accorded to voters who live in the mountains, for example, as opposed to those who reside in the cities, and any attempts to rationalize on the basis of geography, sociology or economics will, as has been shown above, necessarily rest upon the subjective evaluation of the minds which attempt the rationalization. Moreover, to say that a majority of the voters today indicate a desire to be governed by a minority, is to avoid the issue which this court is asked to resolve. It is no answer to say that the approval of the polling place necessarily evidences a rational plan. The plaintiffs have a right to expect that cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice.

I do not say that a rational plan can not be devised which is not based upon strict numerical equality. It is enough to say that the instant plan, with its gross and glaring inequalities, is not based upon a rational formula or upon any formula which is apparent. Moreover, a plan which builds into the state organic law senatorial districts which are designed to be static in perpetuity, regardless of population changes, is doomed to obsolescence before it becomes effective.

Amendment No. 7 violates the Constitution of the United States and is, therefore, invalid and void. Amended Section 46 of Amendment No. 7, which redistricts the House of Representatives, can not be severed from Amended Section 46, and hence the entire Amendment is void. I would so hold.

Appendix C

CHAPTER 63

GENERAL ASSEMBLY

• • • • •

ARTICLE I

Membership

• • • • •

63-1-1. *Members of general assembly.*—The senate of general assembly of the state of Colorado shall consist of thirty-five members, and the house of representatives thereof shall consist of sixty-five members. No senatorial or representative district shall embrace the same territory within any other senatorial or representative district, respectively.

• • • • •

63-1-2. *Ratios fixed and established.*—The following ratios are hereby fixed and established for the apportionment of senators and representatives of the general assembly.

(1) The ratio for the apportionment of senators shall be:

(a) One senator for each senatorial district for the first nineteen thousand of population therein;

(b) One additional senator for each senatorial district for each additional fifty thousand of population therein or fraction over forty-eight thousand.

(2) The ratio for the apportionment of representatives shall be:

(a) One representative for each representative district for the first eight thousand of population therein;

(b) One additional representative for each additional twenty-five thousand five hundred of population therein, or fraction over twenty-two thousand four hundred.

Source: L. 53, p. 120, § 2.

.

63-1-3. *Senatorial districts.*—The state of Colorado shall be divided into twenty-five senatorial districts, numbered and entitled to the number of senators, as follows:

The city and county of Denver shall constitute the first senatorial district and be entitled to eight senators.

The county of Pueblo shall constitute the second senatorial district and be entitled to two senators.

The county of El Paso shall constitute the third senatorial district and be entitled to two senators.

The county of Las Animas shall constitute the fourth senatorial district and be entitled to one senator.

The county of Boulder shall constitute the fifth senatorial district and be entitled to one senator.

The counties of Chaffee, Park, Gilpin, Clear Creek, Douglas and Teller shall constitute the sixth senatorial district and be entitled to one senator.

The county of Weld shall constitute the seventh senatorial district and be entitled to two senators.

The county of Jefferson shall constitute the eighth senatorial district and be entitled to one senator.

The counties of Fremont and Custer shall constitute the ninth senatorial district and be entitled to one senator.

The county of Larimer shall constitute the tenth senatorial district and be entitled to one senator.

The counties of Delta, Gunnison and Hinsdale shall constitute the eleventh senatorial district and be entitled to one senator.

The counties of Logan, Sedgwick and Phillips shall constitute the twelfth senatorial district and be entitled to one senator.

The counties of Rico Blanco, Moffat, Routt, Jackson and Grand shall constitute the thirteenth senatorial district and be entitled to one senator.

The counties of Huerfano, Costilla and Alamosa shall constitute the fourteenth senatorial district and be entitled to one senator.

The counties of Saguache, Mineral, Rio Grande and Conejos shall constitute the fifteenth senatorial district and be entitled to one senator.

The county of Mesa shall constitute the sixteenth senatorial district and be entitled to one senator.

The counties of Montrose, Ouray, San Miguel and Dolores shall constitute the seventeenth senatorial district and be entitled to one senator.

The counties of Kit Carson, Cheyenne, Lincoln and Kiowa shall constitute the eighteenth senatorial district and be entitled to one senator.

The counties of San Juan, Montezuma, La Plata and Archuleta shall constitute the nineteenth senatorial district and be entitled to one senator.

The counties of Yuma, Washington and Morgan shall constitute the twentieth senatorial district and be entitled to one senator.

The counties of Garfield, Summit, Eagle, Lake and Pitkin shall constitute the twenty-first senatorial district and be entitled to one senator.

The counties of Arapahoe and Elbert shall constitute the twenty-second senatorial district and be entitled to one senator.

The counties of Otero and Crowley shall constitute the twenty-third senatorial district and be entitled to one senator.

The county of Adams shall constitute the twenty-fourth senatorial district and be entitled to one senator.

The counties of Bent, Prowers and Baca shall constitute the twenty-fifth senatorial district and be entitled to one senator.

63-1-4. *Election of senators.*—Four senators shall be elected from the first senatorial district and one each from the second, third, sixth, seventh, tenth, twelfth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, twentieth and twenty-fifth districts at the general election held in November, 1954, and every four years thereafter.

Four senators shall be elected from the first senatorial district and one each from the second, third, fourth, fifth, seventh, eighth, ninth, eleventh, thirteenth, nineteenth, twenty-first, twenty-second, twenty-third, and twenty-fourth districts at the general election held in November, 1956, and every four years thereafter.

.

63-1-5. *Senators keep office—vacancies.*—Nothing in this article shall be construed to cause the removal of any senator from his office for the term for which he has been elected, but all such senators shall serve the term for which they were elected; provided, that in case of a vacancy caused by the death, resignation or otherwise of any such senator or senators, the vacancy shall be filled as provided by law from the new district as provided for in this article.

Source: L. 53, p. 122, § 5.

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63-1-6. *Members of house of representatives.*—The members of the house of representatives shall be divided among the several counties of the state as follows:

The city and county of Denver shall have seventeen.

The county of Pueblo shall have four.

The county of Weld shall have three.

The county of El Paso shall have three.

The county of Las Animas shall have one.

The county of Boulder shall have two.

The county of Larimer shall have two.

The county of Arapahoe shall have two.

The counties of Crowley and Otero shall have two.

The county of Mesa shall have two.

The county of Delta shall have one.

The county of Huerfano shall have one.

The county of Jefferson shall have two.

The county of Logan shall have one.

The county of Morgan shall have one.

The county of Adams shall have two.

The county of Yuma shall have one.

The counties of Washington and Kit Carson shall have one.

The counties of Prowers and Baca shall have one.

The counties of Routt, Moffat, Grand and Jackson

shall have one.

The counties of Montrose and Ouray shall have one.

The counties of San Miguel, Dolores and Montezuma shall have one.

The counties of La Plata and San Juan shall have one.

The counties of Hinsdale, Gunnison and Saguache shall have one.

The counties of Rio Grande and Mineral shall have one.

The counties of Conejos and Archuleta shall have one.

The counties of Alamosa and Costilla shall have one.

The counties of Fremont and Custer shall have one.

The counties of Park, Teller, Douglas and Elbert shall have one.

The counties of Lake and Chaffee shall have one.

The counties of Eagle, Pitkin, Summit, Clear Creek and Gilpin shall have one.

The counties of Rio Blanco and Garfield shall have one.

The counties of Sedgwick and Phillips shall have one.

The counties of Cheyenne and Lincoln shall have one.

The counties of Kiowa and Bent shall have one.

.

63-1-7. *Representatives keep office — biennial elections.*—Nothing in this article shall be construed to cause the removal of any representative from his present term of office, and representatives shall be elected under the provisions of this article beginning with the general election held in November, 1954, and every two years thereafter.

.

63-1-8. *New counties.*—In the event that any new county is created at any time after the passage of this article, and the legislature has not provided for the attaching of said new county to a specifically mentioned district, then such new county shall be deemed to be in the senatorial or representative district that said territory was in prior to its creation.

OCT 24 1963

JOHN F. DAVIS, CLERK

IN THE
**SUPREME COURT
OF THE UNITED STATES**

No. 508 October Term 1963

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens
of the State of Colorado, taxpayers and electors therein, for
themselves and for all other persons similarly situated,

Appellants,

—vs—

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLO-
RADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLO-
RADO, HOMER BEDFORD AS TREASURER OF THE STATE OF
COLORADO, AND BYRON ANDERSON AS SECRETARY OF STATE
OF THE STATE OF COLORADO, EDWIN C. JOHNSON, JOHN C.
VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING and WILBUR
M. ALTER,

Appellees.

MOTION TO DISMISS OR AFFIRM

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M. ALTER,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the
Supreme Court of the United States move that the appeal
be dismissed or, in the alternative, that the judgment of
the court below dismissing complaints attacking the appor-
tionment of the membership of the Colorado legislature be
affirmed.

QUESTIONS PRESENTED

1. Should the Supreme Court accept jurisdiction in
an appeal from a determination by the Court below that a
Colorado Constitutional Amendment providing for the ap-

portionment of two houses of the legislature does not violate the equal protection clause when:

(a) the state method of apportionment results from a state constitutional amendment arising from initiative and referendum wherein the vote of each voter is given equal weight; and the apportionment amendment was adopted at the general election of November, 1962;

(b) the state constitutional right to initiative and referendum is a frequently exercised remedy available to the electorate;

(c) the apportionment prescribed by the people carried, not only in the state as a whole, but in every county thereof—urban as well as rural;

(d) at the same time the electorate of the state as a whole and in every county thereof rejected another initiated amendment which would have apportioned both houses on a strict census basis;

(e) the method prescribed by the electorate apportions the lower house of the state legislature on a strict population basis and apportions the upper house on both a population basis and geographical basis, but the method does not result in the control of either house by a minority of the populace; and

(f) the essential sole basis of the appeal is that any method of apportionment which is not based upon a strict census of the population is *per se* invidiously discriminatory and violative of the equal protection clause of the Fourteenth Amendment.

2. Is there a violation of the equal protection clause of the Fourteenth Amendment where the lower house of

a bicameral state legislature is composed of members elected from districts apportioned on a strict population basis and the upper house is composed of members elected from senatorial districts varying in population but established by state constitutional amendment, initiated by the people in 1962 and carried at referendum in the state as a whole and in every county of the state, when the basis of the apportionment in the Senate gives rational consideration to both population and the state's heterogeneous, economic and geographical characteristics?

STATEMENT

This is a direct appeal from the final judgment entered July 10, 1963 by a District Court of three judges convened pursuant to 22 U.S.C. Sec. 2281. Page references made herein are to Appellants' Jurisdictional Statement and Appendices.

There were two proceedings in the court below. The first concluded on August 10, 1962 when the court held that there had been *prima facie* established a case of invidious discrimination. However, the court noted an initiated constitutional amendment on the ballot for the ensuing general election and continued the case until after such election. There were two such amendments submitted to the electorate. Amendment No. 7 (the basis for the complaint of appellants) was adopted, and Amendment No. 8 was rejected in the state as a whole and in each county thereof. The rejected Amendment No. 8 proposed to apportion both houses of the bicameral Legislature strictly on a population basis.

Subsequent to the referendum and the approval of Amendment No. 7, further pleadings were filed with the court below and the issue was joined on the constitutionality

of Amendment No. 7. The court below (p. 50) properly describes Amendment No. 7 as follows:

"Amendment No. 7 created a General Assembly composed of a Senate of 39 members and a House of Representatives of 65 members. The state is divided into 65 representative districts 'which shall be as nearly equal in population as may be' with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which 'shall be as nearly equal in population as may be.' Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census."

As the court below noted, the case as presented to it subsequent to the approval of Amendment No. 7 did not present the issues as they existed prior to the apportionment made by Amendment No. 7.

The court found that Colorado is "an economically or geographically heterogeneous unit," and that the topography of the state is the most significant contributor to the diversity. The court then went on in detail (pp. 58-61 inclusive) to point out that the state is composed of high plains on the east and high mountains on the west with various river drainages; that there are transportation difficulties of varying severity; that the availability of water supply has caused conflicts over the use of water and has been a source of trouble to the state since its admission to the Union; and that the population is concentrated heavily along the eastern edge of the foothills in the Rocky Mountains in a relatively narrow strip. Upon the basis of the specifics, the court stated (pp. 65, 66):

"The heterogeneous characteristics of Colorado justify geographic districting for the election of the members of one chamber of the legislature. In no other way may representation be afforded to insular minorities. Without such districting the metropolitan areas could, theoretically, and no doubt practically, dominate both chambers of the legislature.

"The plaintiffs make much of the disparities in senatorial representation which vary downward from 3.6 to 1. They say that the deviations from per capita standards are impermissible. We do not agree. The distributive scheme of Amendment No. 7 may not be perfect but it does recognize the geographic diversities, the historic grouping of counties, and the accessibility of a candidate to the voters and of a senator to his constituents. The realities of topographic conditions with their resulting effect on population may not be ignored. For an example, if the contention of the plaintiffs was to be accepted, Colorado would have one senator for approximately every 45,000 persons. Two contiguous Western Region senatorial districts, Nos. 29 and 37, have a combined population of 51,675 persons inhabiting an area of 20,514 square miles. The division of this area into two districts does not offend any constitutional provisions. Rather, it is a wise recognition of the practicalities of life. An analysis of the other senatorial districts in all the regions except the populous East Slope would merely emphasize the point."

Appellees Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing, and Wilbur M. Alter were allowed to intervene in the proceedings in the court below as parties, their interests not coinciding with those of the other appellees, and they have filed a motion herein, to which appellants and the other appellees have consented.

that they be added as appellees before the United States Supreme Court.

ARGUMENT

At the outset several facts stand out. First, there is available to the voters of Colorado an often-used method for initiating constitutional amendments and statutes and submitting them to public referendum, wherein each voter of the state has equal voice with each other voter. The court below (p. 62) points out that in Colorado, by Colorado Constitution, Article V, Section 1, a constitutional amendment may be initiated by 8% of the legal voters and that no geographical distribution of petition signers is required. The reference is to the number of votes cast at the last general election for the Secretary of State. Thus, the percentage of *eligible* voters required to initiate a petition is much less than 8%. This provision is undoubtedly among the most liberal of its type in the nation in terms of the ease with which a measure may be placed on the ballot.* Secondly, the voters of Colorado overwhelmingly adopted the constitutional amendment which the appellants now attack. This approval was given by the urban areas as well as by the rural areas. Under Amendment 7 the urban areas of Colorado control both houses of the legislature, for as appellants admit (p. 17), the urban areas, under this amendment, control the Senate by a simple majority; and, of course, the voters in these areas also control the House of Representatives by a majority of approximately two to one. Third, appellants have not attacked any of the Findings of Fact by the court below which, operatively, go to the heterogeneous and diverse characteristics of the State of Colorado. Fourth, the essence of appellants' contentions

*Note: Appellants' constant reference to the reapportionment in Colorado as being in perpetuity cannot be accorded any weight when the existence of this frequently utilized remedy is recognized.

is that any method of apportionment which is not based upon a strict census of the population is *per se* invidiously discriminatory and violative of the equal protection clause of the Fourteenth Amendment.

Appellees submit that the decision in *Baker v. Carr*, 369 U.S. 186 (1962) did not go further than uphold the jurisdiction of Federal Courts, in the first instance, as to cases alleging deprivation of Federal constitutional rights. Where, as here, a full hearing reveals not only that there is a rational basis, in fact and opinion, for the action of the state, but further that there is no resulting urban-rural impasse; the Supreme Court of the United States should not entertain jurisdiction of an appeal. It being shown that the majority (in a general statewide election wherein all votes were counted equally) prefers to impose restraints on itself, pursuant to adopting a legislative structure thought best for the entire state, it is difficult to discern any reason for the Supreme Court to substitute its particular eclecticism for that of the voters. The Supreme Court has declined to take such action, in analogous situations, either on the ground of want of equity, as in *MacDougall v. Green*, 335 U.S. 285 (1948) and *American Federation of Labor v. Watson*, 327 U.S. 582 (1946), or on the ground of abstention, *Louisiana Power & Light Co. v. Thibodeaux*, 360 U.S. 25 (1959), *Martin v. Cressy*, 360 U.S. 219 (1962).

Appellees therefore respectfully submit that the appeal should be dismissed.

Appellees further submit that a rational departure from a strict population basis is permissible and is so clearly justified, as shown by the appendices to the Jurisdictional Statement, that further consideration need not be given to this matter, and the court may affirm forthwith.

Appellees do not intend to elaborate this argument beyond the most succinct statement because the cogent

opinion of the court below is the best presentation of the facts and the law.

The essence of the argument of appellants, that there can be no constitutional deviation from strict population apportionment, carries with it the corollary argument that where, as in Colorado, there are divergences in the interests of the populace in one portion of the state as compared to other portions of the state, such diverse interests may not be recognized and given an effective voice in the legislature. To carry the argument of appellants logically one step further is to say that a minority may be discriminated against by muting these other and important interests, and an invidious discrimination is perfectly proper so long as it is a minority, albeit an important minority, that is being discriminated against. To state this argument is to refute it.

This case is unusual insofar as considerations entering into apportionment are concerned. It is a case where the populace of the state as a whole has spoken almost currently with the issue here before the court and has clearly chosen a method of apportionment and representation which recognizes diverse interests and just as clearly refused a method of apportionment advocated by appellants. Unlike the situation obtaining in *Baker v. Carr, supra*, and in other cases before the court, the situation in Colorado is one in which there has been a frequent awareness of the problems of apportionment. Legislative revisions have occurred in 1881, 1891, 1901, 1909, 1913, 1953. Changes initiated by the people were adopted in 1932 and, of course, in 1962, by the adoption of Amendment No. 7. A referred proposal and an initiated proposal were rejected by the voters in 1954 and 1956 respectively. Further, as stated by the lower court (pp. 62, 63), the matter was under constant study and consideration by the people of the State of Colorado from 1956 until the adoption of the present amendment at

the election in 1962. Instead of a situation indicating no policy, Colorado illustrates a situation in which the people have evolved a thoroughly considered judgment as to the structure of their own government.

With the undisputed facts as they are, appellees respectfully submit that appellants present no question of such substantiality that this court's plenary consideration is called for. The judgment of the District Court should be affirmed.

Most respectfully submitted,

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JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

ANDRES LUCAS and ARCHIE L. LISCO, individually, and as citizens
of the State of Colorado, taxpayers and electors therein, for
themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLO-
RADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLO-
RADO, HOMER BEDFORD AS TREASURER OF THE STATE OF
COLORADO, AND BYRON ANDERSON, AS SECRETARY OF STATE
OF THE STATE OF COLORADO,

Appellees.

BRIEF OPPOSING MOTION TO DISMISS
OR AFFIRM

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COLORADO, AND BYRON ANDERSON, AS SECRETARY OF STATE
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Appellees.

**BRIEF OPPOSING MOTION TO DISMISS
OR AFFIRM**

STATEMENT OF THE CASE

There has heretofore been filed in accordance with the Rule and by the Appellants, a Jurisdictional Statement and appendices, reference to which is made hereby, and which is appropriately incorporated herein. Within the time prescribed by the Rule, there has been filed on behalf of the Appellees a Motion to Dismiss or Affirm, which Motion does not controvert any of the basic factual matter set forth in the Jurisdictional Statement.

Basically, it is argued that inasmuch as the voters of Colorado have accepted at the polls an amendment to the State Constitution, resulting in a freezing of the Colorado Senate essentially in the manner declared unconstitutional by previous *per curiam* opinion of the Three-Judge Court (Jurisdictional Statement, Appendix A), the fact of that vote is in itself sufficient to render valid, as concerns the Fourteenth Amendment and particularly its equal protection guarantees, the discrimination admittedly implicit in the Senate structure.

It is upon that hypothesis postulated that the matters presented ought not be considered by the Supreme Court of the United States.

Because the Jurisdictional Statement is detailed; because little is set forth in the Motion to Dismiss or Affirm save the assertion that the vote of the people of Colorado serves to negate rights of citizens of the United States under the Fourteenth Amendment, we will only briefly reply herein:

**A. THE MOTION TO DISMISS OR AFFIRM
SETS FORTH IN SUBSTANCE NONE OF
THE GROUNDS FOR SUCH RELIEF PRO-
VIDED IN THE SUPREME COURT RULE.**

Motion to Dismiss or Affirm is governed by Rule 16 of this Court. Under subdivision 1(a) it is provided that the court will receive such a motion on the ground that the appeal is not within the jurisdiction of this Court, because not taken in conformity with the statute or the rules. No such contention is made, and, of course, no such fact obtains. The procedure is pre-eminently within the

2

cognizance of this Court, being a direct appeal from a Court of Three Judges, especially convoked because of the high constitutional importance of the issues presented, which has itself unanimously agreed upon the jurisdictional adequacy of the proceedings instituted before it, and which has proceeded with the utmost of expedition with the express purpose of allowing presentation before this Court of a singularly important constitutional question as early as possible.

Section 1(b) is not applicable, relating only to appeals from a state Court.

Section 1(c) notes that this Court will receive such a motion on the ground that "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." The question of unsubstantiality of ground, then, is the *only ground* upon which the motion can rest. To state that proposition is to demonstrate its inapplicability at bar.

In essence, the most far reaching decisions rendered by this Court in many years are those relating to the questions of racial segregation and those relating to the questions of representation and franchise, as reflected in the highly differential nature of the composition of the legislatures of the several states. No questions more basic to our constitutional structure have presented themselves in several generations, and their substantiality is beyond question.

In Colorado the question is presented in uniquely pure form. Abuses have been here prevalent in virulent form almost since its admission as a State. Those abuses have continued unabated, the Legislature regularly hav-

+

ing ignored the express mandate of the Colorado Constitution to reapportion in accordance with population, and the state never having really been properly so apportioned. So manifest are these abuses, and so long continued, that in the initial *per curiam* opinion (Jurisdictional Statement, Appendix A), the Three-Judge Court arrived at the unanimous opinion that the Colorado statutes were unconstitutional and void; that a *prima facie* case of violation of the Fourteenth Amendment had been made; and that it was unlikely that any legislative relief would be granted.

To date, no Colorado legislature has sat composed either upon a basis consonant with the Colorado Constitution, or upon the basis required under the Fourteenth Amendment.

Because what is described as a group of "insular economic interests" in the State desired the preservation of the discriminatory system, whereby less than one-third of the population dominated the State Legislature, there was presented a Constitutional Amendment, the so-called Amendment 7.

That Amendment recognized population as the necessary basis for the House of Representatives — as the Constitution of Colorado had always recognized population as the *only basis* for both houses — but it absolutely and forever abjured population as a basis for the Senate. After increasing by three members the total membership of the Senate, that Amendment perpetually froze it upon the lines of the districts established by the Statute expressly declared by the trial Court to be unconstitutional, separating the Senate forever from any connection with population.

No rational basis for these distinctions can be found, except that the Trial Court, in the majority opinion of two of its members, radically criticized by the third, attempts to argue that it is necessary to prevent control of the legislature by the majority of the people because that majority, being resident in the populous areas of the State, might not be sufficiently sensible of the special economic interest of the "insular" groups resident in the mountains, interested in mining, in water, and in agriculture.

Admittedly, under the Amendment, the least populated Senate district is allowed one Senator for 18,414 persons. The most heavily populated district, which is one growing continually in relative and absolute population, is allowed and will in perpetuity be allowed one senator, now for 71,871, and perpetually for however many more may inhabit the district. Under the Amendment, 460,620 persons elect 19 members of the Senate. 1,203,328 persons elect 26 members of the Senate. Effectively, less than one-third (1/3) of the population controls the Senate. Obviously, control of either house of the legislature is control of the legislature. It was so designed, and it is candidly stated in the evidence, supported by the Majority Opinion, that this differential is a constitutionally proper one, for there must be a certainty that the "special" or "insular" economic interests outside the urban and suburban portions of the State remain in perpetuity dominant within it.

Historically, the mountain and rural population of Colorado has continually declined, while the urban area, being a narrow strip along the mountains, centering in Denver, has continually increased, and, it is hypothesized, will by 1980 contain more than 90% of the State population. It will still be in a minority legislatively.

No factual challenge to this situation is presented. It is merely said that legislators do not represent people, that there is no necessity of an equation of persons and vote, and that there may be bifurcation of the population basis, scrupulously allowing it in one house, and sedulously ignoring it in another.

We will not fully discuss these matters for the reasons that the differing view is clearly set forth in the Jurisdictional Statement, as in numerous briefs now before this Honorable Supreme Court in cognate cases, and that view is carefully set forth as well in the dissenting Opinion of Judge Doyle in the Three-Judge Court, (Jurisdictional Statement, Appendix B(1)).

Substantiality of the basic question has been thoroughly indicated by this Court heretofore:

1. In the fundamental decision in *Baker vs. Carr*, 369 U.S. 186 (1962), this Court confirmed the basic thesis that the fourteenth amendment guarantees of equal protection are offended by a gross malapportionment of state legislative election districts, in such manner that the issue becomes a justiciable one, of which the Courts have cognizance, the Court noting that standards might be developed in particular cases and that "judicial standards under the Equal Protection Clause are well developed and familiar."

Since that decision, endeavors to avoid its implication have been rampant, principal among them the endeavor to revamp State constitutions in such manner as to abandon in the one house of the State legislature the principal of popular basis for representation. Such a device is a blatant avoidance of propriety, and, being without historical

basis, or basis in good faith, it is submitted is outside the pale of the permissible. That bare question is presented by the Colorado case. It is submitted that that question is in every sense "substantial" requiring full presentation to and consideration by this Honorable Court.

2. Further implementing its general position in regard to the franchise, this Court has decided *Gray vs. Sanders*, 372 U.S. 368 (1963), factually different from this case in that the county-unit system is there under consideration, but important in that the case would appear to stand for the principal that full equality of voting right is required by the equal protection clause of the fourteenth amendment. If such is the requirement in a statewide primary, it is difficult to see why that requirement is not paralleledly applicable to state legislative election. Mr. Justice Douglas has noted that the controlling principle must be "one person, one vote". 372 U.S. at 381. Justices Stewart and Clark in concurring agree that the principal of equal protection has within it implicit the thesis of "one voter, one vote." *id* at 382.

This decision forwards greatly the thesis that franchise is of the very essence of citizenship and that franchise must involve equality, each vote precisely equalling each other. If other than that thesis is applied, then one man is something less than or above or greater than another in law, a thesis which would appear intolerable.

3. In varying form these precise questions, as pointed out in the Jurisdictional Statement (pages 6 and 7) have been presented in a series of cases before this Court. In July of this year, the Court noted probable jurisdiction in each of those cases, so noting in *WMCA, Inc. et al. vs. Simon*. (No. 460, Oct. Term, 1962, No. 20,

Oct. Term, 1963); *Maryland Committee For Fair Representation vs. Tawes* (No. 554, Oct. Term, 1962, No. 29, Oct. Term, 1963); *Reynolds vs. Sims*, with which are combined *Four vs. Frink* and *McConnell vs. Frink* (Nos. 508, 540, and 610, Oct. Term, 1962, Nos. 23, 27, and 41, Oct. Term, 1963); and *Davis vs. Mann*, (No. 797, Oct. Term, 1962, No. 69, Oct. Term, 1963). Probable jurisdiction in each of those cases is noted in memoranda opinions appearing in 83 S. Ct. (1963), at pages 1692 and 1693.

The facts in *Davis vs. Mann*, referred above, are peculiarly cognate to those in *Colorado*. Historically, as the Three-Judge Court there pointed out, no basis but population really ever existed for representation, and there was no basis for differentiation of the Senate and the House. In the Opinion, 213 F. Supp. 577, the Court says:

"In this consideration there is no difference in status between the Senators and Delegates in their disposition throughout the State. The Senate and House each have a direct, indeed the same, relation to the people. No analogy of the state Senate with the federal Senate in the present study is sound. The latter is a body representative of the states qua states, but the state Senate is not its regional counterpart. State senatorial districts do not have state autonomy. The bicameral system is a creature of history and many of the reasons for its creation no longer obtain. The chief justification for bicameralism in state government now seems to be the thought that it insures against precipitative action — imposing greater deliberation — upon proposed legislation."

The Virginia court found that "no acceptable formula, plan or design is shown us to account for the disparate

divisions of the state." Admittedly, none in Colorado exists, except what is claimed to be economic expediency, the "protection" of "insular economic interests."

Pursuant to the instruction of this Court, the Supreme Court of Michigan has considered the Michigan system in *Scholle vs. Hare*, 116 N.W.2d 350, 367 Mich. 176. That system involved an almost cognate attempt by Michigan to eliminate equality of representation by Senate distortion.

In holding invalid the Senate provisions that Court noted:

"The absence of any semblance of design or plan in the present senatorial districts was recently acknowledged by D. Hale Brake, a Michigan lawyer and former State treasurer from 1943 through 1954, now a constitutional convention delegate, in an article entitled, 'The Old and the New Constitutions — a Comparison and Appraisal' dated May 16, 1962, signed by Mr. Brake as 'Director, Education Division, Michigan Association of Supervisors, 319 W. Lenawee, Lansing 33, Michigan,' and sent to members of the association. Mr. Brake concluded with appropriate accuracy: 'OUR PRESENT SENATE, OF COURSE, DOES NOT FOLLOW ANY PLAN. IT IS SIMPLY AN ARBITRARILY FREEZING IN OF VARIOUS DISTRICTS.'"

The Colorado arrangement under Amendment 7 is and purports to be nothing more than an arbitrary freezing in of an existing arrangement which the three-judge court itself declared, as a statute, to be unconstitutional and without logical or legal basis. It is the endeavor to freeze in perpetuity the illegal result of eighty years of

deliberate refusal to follow either the requirements of the State Constitution or the Fourteenth Amendment. It is sought to justify this on the basis that people voted for it.

In candor, it must be stated that the fact that people did or did not vote for it is of no moment. Constitutions are not to be put aside because the people of a state vote for such dissection. The populace of Colorado cannot deprive any member of his rights under the Constitution of the United States by voting an amendment to the Constitution of Colorado, and the thesis that that may be done strikes at the fundament of constitutional government. Constitutional limitations are not bulwarks of reckless majority. The limitations are upon majority, even upon government itself, in protection of those who otherwise are defenseless.

This Court has accepted jurisdiction in the group of cases mentioned above. None of them presents a more cogent basis for consideration of fundamental constitutional problems than the Colorado case. Since this Court has in the cognate cases, arising on almost identical bases in other states, accepted jurisdiction, then it is submitted that the *substantiality* of the questions presented is beyond question. The very fact of their protracted consideration by the trial court indicates them substantial. The fact of a fundamental *legal disagreement* in the three judges constituting that Court indicates that there is substantiality of question presented.

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4. AMENDMENT 7 IS IN NO MANNER PROTECTED BECAUSE IT WAS ADOPTED BY POPULAR VOTE.

It is alleged that in some manner the fact that the Colorado population approved by vote the amendment attacked protects that amendment against a charge of invalidity as violative of the equal protection provisions of the Fourteenth Amendment. Colorado was required by the Enabling Act by which it was permitted to enter the Union to adopt a Constitution specifically including the Fourteenth Amendment. When any provision of the State Constitution, adopted by no matter what majority, trespasses upon the area protected by the Fourteenth Amendment, the State Constitution is in that area void. Thus, the Supreme Court of Colorado has repeatedly stricken down Constitutional Amendments because they were violative of the provisions of the Constitution of the United States: *People vs. Western Union Telegraph Company*, 70 Colo. 90, 198 Pac. 146, and *People vs. Max*, 70 Colo. 100, 198 Pac. 150 did precisely that. Amendments purportedly prohibited trial judges from passing on constitutionality of purported legislative enactments. The Colorado Court held not only that a judge might do so, but that he must, and any purported limitation placed by the State Constitution on his power so to do violated the Constitution of the United States.

What the whole people of a state are powerless to do directly, either by statute or constitution, i.e., set aside the Constitution of the United States, they are equally powerless to do indirectly, either by a pretended authority granted to a municipality, or by a popular election, under the guise of a recall. (Em-

phasis supplied). The original Constitution of Colorado was a solemn compact between the State and Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save in accordance with their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violations of the supreme compact and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union; and no power in the people to command their courts to do so. That issue was finally settled at Appomattox.

Certainly many other authorities could be cited. When, however, the supreme judicial authority in Colorado has pointed out this limitation upon the people of Colorado in changing their own constitution, and when the only thing with which we contend is an amendment to the Colorado Constitution contended to be void because violative of the United States Constitution, it can scarcely be contended that constitutionality is one whit affected by the fact or the extent of popular approval of the offending provision. The device was calculate to set at naught equality of franchise and to vest legislative control of Colorado in the minority of its people. The promotion of this amendment was expertly conducted. Its purpose was

wrong; its effect is illegal; and no sanctity inheres in the vote of the people to deprive others of their vested constitutional right, the right to vote. That exercise of the franchise is beyond the power of any majority, and an amendment so based and founded must be void.

**C. THE SITUATION IN COLORADO TYPIFIES
THE EVILS NECESSARILY TO BE REME-
DIED BY THE SALUTARY DOCTRINES
ANNOUNCED BY THIS COURT.**

As shown in the Memorandum Opinion (Jurisdictional Statement, Exhibit A), the discrimination arising out of the unequal apportionment in the Colorado situation; as in each of the cases now before the Supreme Court, jurisdiction in which is now noted, and argument in which are now set, is a denial of the equal protection guaranteed by the Fourteenth Amendment.

1. The discrimination arises out of unequal apportionment and is gross and arbitrary. The discrimination is directly against suburban and urban centers and in favor of rural areas. This is unjustified, and time must serve to intensify effect, since population in the United States has for half a century been and is increasingly an urban and suburban function, and the votes of the majority may not be diluted simply because it lives in cities. Moreover, the arbitrary patterning of this result has amounted to a kind of gerrymandered or crazy-quilt distribution, which the majority of the Court can only justify by calling it a protection of "insular interests", and which reality must characterize as a sanctioned vesting of minority economic interests with the prerogatives of majority popular control. Representatives in a legislature represent people, not

mountains, nor plains, nor roads, nor forests, nor cattle. The people live in the cities and their suburbs, as once they lived on the farms and near the mines. The fact that they no longer do so does not mean that in a legislature we must represent "mining" or "farming" or "cattle raising". If these economic functions cease to be dominant in the legislature, it is because their importance in fact has ceased to be dominant so far as concerns the majority of people in the State. People and only people, wherever they live, must be represented, equally and with equal voice. If that result in some alteration in balance or economic controls, such is the necessary implicate of a vital, fluid, and changing economic world.

2. Inequality of voter representation deprives individual voters unquestionably of the equal protection of the laws, with a resultant impairment in the state legislative process, which must look to "interests" rather than to people, to the lobby and lobby controls rather than to the popular mandate. At best, it creates a situation of stalemate between the one house responsible directly to people and another responsible to no one but a vestiture of "insular interests". This necessarily results in a splitting of aim, a bifurcation of policy, and even a negation of those purposes to which the central aims of the nation are dedicated. The result must be an undermining of the federal system of government, obvious implicit in the notion that a majority of citizens of a state may somehow by amending their state constitution negative the rights of others federally derived. If this right of franchise can be so taken, then what other right guaranteed by the nation to its citizens may not in isolated states and territories be denied?

3. The justifications advanced, such as area, history,

the federal analogy, the availability of initiative, and even governmental boundaries are without cogency. Colorado has never recognized any basis for apportionment other than population; it has never recognized anything different in the one house than in the other, for both have been based on population. It has discovered, however, that a sudden divorce in the Senate of the population nexus will result in a control of the Senate by certain minority economic interests which desire to preserve that control as against the majority urban and suburban population. It has been discovered that certain techniques of referendum salesmanship can persuade variant population groups, for various reasons, to support an amendment. It is argued that in this way the right of equal protection of the franchise under the Fourteenth Amendment to the United States constitution can be locally subverted. As the Colorado Court has pointed out, this is a time-worn argument, outmoded at Appomattox. It is the argument which has met every attempt to implement the basic rights decisions of this Court. The right of an individual is not dependent on the suffrage or the will of his neighbors or a majority of them. It is protected absolutely, and no matter by what majority desired to be put down, if it is in fact a right, it must be upheld.

The substantiality of the question here presented before the Court is inherent in these propositions. If indeed equality of franchise is a right, then it is protected under the Fourteenth Amendment. If so protected, a State constitutional provision purporting to ignore equality of franchise in so important a matter as the selection of the Senate of a State cannot stand. No more squarely placed nor substantive question, it is submitted, can be put before this Honorable Court for decision.

CONCLUSION

In conclusion, it is urged that the matters presented to the Court are of the highest substantive significance, and are cogent. It is urged that the Court take jurisdiction of this cause.

Most respectfully submitted,

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October Term, 1963

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IN THE
**SUPREME COURT
OF THE UNITED STATES**

October Term, 1963

No. 508

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens
of the State of Colorado, taxpayers and electors therein, for
themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLO-
RADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLO-
RADO, HOMER BEDFORD AS TREASURER OF THE STATE OF
COLORADO, AND BYRON ANDERSON, AS SECRETARY OF STATE
OF THE STATE OF COLORADO;

Appellees.

APPELLANTS' BRIEF

Come now the Appellants above named, by their at-
torneys of record, under and in pursuance of Rule 40 of
the Rules of the Supreme Court, and pursuant to an Order
of the Court made January 6, 1964, and as their Brief
state as follows:

1(a). Opinions Below:

This Appeal arises from and upon the Judgment of the United States District Court for the District of Colorado, sitting as a Court of three judges, properly convoked under applicable statute, in consolidated actions, being:

Archie L. Lisco, et al. vs. John Love, et al., No. 7501, and

William E. Myrick, et al., vs. The Forty-Fourth General Assembly of the State of Colorado, et al., No. 7637,

which opinion was rendered and entered on July 16, 1963, and is reported in 219 F. Supp. 922, under the title *Lisco vs. Love*. Theretofore, on August 10, 1962, the same Court of three judges in the same action had rendered a Memorandum Opinion, which appears in 208 F. Supp. 471, under the title *Lisco vs. McNichols*.

The Memorandum Opinion has been previously printed as Appendix A of the Jurisdictional Statement herein, and the Opinion and Dissent appear in that same document, as Appendix B and B(1) respectively.

1(b). Jurisdiction:

The grounds upon which jurisdiction of the Supreme Court is invoked are as follows:

I. This is a proceeding on appeal from a final judgment of a three-judge Court, involving denial of injunctive and other equitable relief, with reference to alleged unconstitutionality of Statutes and a Constitutional provision

of the State of Colorado. Appeal is taken pursuant to Section 1253, 28 USCA;

"#1253. Direct appeals from the decisions of three-judge courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

The subject actions directly involve legislative apportionment, and the question of validity, under the Fourteenth Amendment to the Constitution of the United States, of the Constitution of Colorado, as it makes provisions for apportionment, and the Colorado statutes relating thereto. A Colorado constitutional provision, existing from the time of statehood to 1962, and statutes enacted in pursuance thereof, required apportionment after each state census and after each federal census. Essentially, no proper apportionment was had; gross distortions developed; and the existing statutes were declared by the three-judge Court, in the Memorandum Opinion, 208 F. Supp. 471, to be unconstitutional. Thereafter, the Constitution was amended, in such manner as to observe the standard of representation of population in the House of Representatives, but removing the Senate from a population basis of selection, providing for its election from perpetually frozen districts, now involving representational distortion in some cases approximating 4 to 1, and incapable of change within the adopted constitutional structure.

The questions presented are fundamentally equal pro-

tection and due process. In essence, they involve determination whether the populace of any state, by vote and alteration of a State constitution, may deprive other and non-consenting portions of the population of fundamental rights of suffrage and representation claimed by them as citizens of the United States under the Fourteenth Amendment.

II. Time of appeal is submitted to be governed by—
Title 28, Section 2101, USCA:

"#2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment, or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final. . . .

III. Applicable dates of proceedings in the District Court of the United States are as follows:

1. The initial Memorandum opinion of the Court (Lisco vs. McNichols, 208 F. Supp. 471) was issued August

10, 1962. It appears as Appendix A in the Jurisdictional Statement.

2. Further pleadings having been filed and trial having subsequently been held thereon, there was entered on July 16, 1963, a Memorandum Opinion and Order signed by Hon. Jean S. Breitenstein, United States Circuit Judge, Tenth Circuit, assigned, and Hon. Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado, (being reported as *Lisco vs. Love*, 219 F. Supp. 922), appearing as Appendix B in the Jurisdictional Statement.

3. Concurrently, on July 16, 1963, there was filed a Dissenting Opinion by Hon. William E. Doyle, Judge of the United States District Court for the District of Colorado (similarly reported), appearing as Appendix B(1) of the Jurisdictional Statement.

4. Orders of Dismissal, pursuant to the majority opinion, were entered July 16, 1963 (record, pages 205-206).

5. On August 1, 1963, Appellant Lucas filed Notice of Appeal to the Supreme Court of the United States (record, page 397).

6. On September 5, 1963, the Clerk of the District Court transmitted to the Clerk of the Supreme Court the record as previously designated in the Notices of Appeal and in a Counterdesignation of Record.

7. Jurisdictional Statement and Motion to Dismiss or Affirm having been previously filed, this Court has heretofore noted probable Jurisdiction and, on January

6, 1964, has made orders relative to the record herein, dispensing with printing, and providing for the filing of Briefs and for oral argument.

IV. It is submitted that jurisdiction of this appeal is conferred upon the Court by Title 28 USCA, #1253 and #2101, above quoted. All requirements have been complied with at appropriate times.

1(c). Statutes and Constitutional Provisions Involved:

Several provisions of the Constitution of Colorado, and several sections of its Statutes, are pertinent to the within proceeding:

I. Article V, Sections 45, 46, and 47 are basic to the present controversy. They are found in Volume I, 1953 Colorado Revised Statutes, on page 307, as follows:

“Section 45. Census.—The general assembly shall provide by law for an enumeration of the inhabitants of the state, in the year of our Lord 1885, and every tenth year thereafter; and at the session next following such enumeration, and also at the session next following an enumeration made by authority of the United States, shall revise and adjust the apportionment for Senators and Representatives, on the basis of such enumeration according to ratios to be fixed by law.

“Section 46. Number of members of general assembly.—The senate shall consist of not more than thirty-five and the house of not more than sixty-five members.

“Section 47. Senatorial and representative districts.

— Senatorial and representative districts may be altered from time to time, as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the district as compact as may be. No county shall be divided in the formation of a senatorial or representative district."

II. Those provisions of the Colorado Constitution purportedly have been amended by an Amendment adopted at the elections of November, 1962, and commonly referred as Amendment No. 7. The amendment was voted November 6, 1962. It appears as Chapter 312, Session Laws of Colorado, First Regular Session 1963, commencing at page 1045, as follows:

**AN ACT TO AMEND ARTICLE V OF THE
STATE CONSTITUTION PROVIDING FOR THE
APPORTIONMENT OF THE SENATE AND
HOUSE OF REPRESENTATIVES OF THE GEN-
ERAL ASSEMBLY AND PROVIDING FOR SEN-
ATORIAL DISTRICTS AND REPRESENTATIVE
DISTRICTS.**

Be It Enacted by the People of the State of Colorado:
Section 1. Sections 45, 46 and 47 of Article V of the Constitution of Colorado are hereby repealed and new Sections 45, 46, 47 and 48 of Article V are adopted, to read as follows:

Section 45.—General Assembly.—The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous

whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

Section 46. — House of Representatives. — The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

Section 47. — Senate. — The state shall be divided into 39 senatorial districts. This apportionment of senators among the counties shall be the same as now provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

Section 48. — Revision of Districts. — At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Sections 45, 46, and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on

account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be provided by law.

The ballot title and submission clause of the proposed initiative amendment to the constitution petitioned for herein as designated and fixed by the Secretary of State, Attorney General and Reporter of the Supreme Court is as follows, to-wit:

An act to amend Article V of the State Constitution providing for a Senate of 39 members and a House of 65 members; provides for 65 Representative Districts to be substantially equal in population; for senatorial Districts apportioning Senators as now provided by law, and one additional Senator is apportioned to Adams, Arapahoe, Boulder and Jefferson Counties; Elbert County being detached from Arapahoe County and attached to a District with adjoining Counties; provides for Senatorial Districts of substantially equal population within Counties with more than one Senator; for revision of Districts by the General Assembly in 1963 and after each Decennial Census thereafter, under penalty of loss of compensation and eligibility of members to succeed themselves in office.

III. The statutory provisions referred to in the said Amendment, Section 63-1-3, 1953 Colorado Revised Statutes, appears in Chapter 63, Article I, 1953 CRS, in Volume 3, page 728. The entire Chapter 63 is pertinent in this matter, and is appended hereto, as Appendix A.

IV. In the Session of 1963, the General Assembly did enact legislation reapportioning in pursuance of Amendment 7. That Legislation is House Bill 65, a copy of which was made an exhibit in the record herein, and which now appears as Chapter 143, Session Laws of Colorado, First Regular Session 1963, commencing at page 520, and continuing through page 532. That statute in its details was not specifically litigated, but the Court having requested information as to its statistical effect, the matters are included statistically in Appendix B hereto.

1(d). **Questions for Review:**

Two original Complaints were filed by the present Appellants and others in the United States District Court for Colorado. Plaintiffs therein, being public officials, citizens, and taxpayers, appeared for themselves and, representatively, for others similarly situate, presenting action against the General Assembly, Governor, Secretary of State, and Treasurer of Colorado, seeking injunctive and other appropriate relief with reference to legislative apportionment in Colorado.

The Lucas Complaint was filed July 9, 1962, and requested convocation of a three-judge Court. It alleged that Colorado exists under a Constitution adopted pursuant to an Enabling Act of Congress, and subject to the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. It was alleged

that one of the inalienable rights of citizenship in the United States and State of Colorado is equality of franchise and vote, and that the concept of equal protection of the laws requires that every citizen be equally represented in the legislature of his State.

In the Memorandum Opinion, 208 F. Supp. 471, the Court recognized the unconstitutional nature of the apportionment existing under the then existing constitutional provisions and statutes, but deferred affirmative action until after elections.

In the elections of November, 1962, there was adopted Amendment 7 referred to above, and the pleadings were supplemented to raise the same substantial questions with reference to Amendment 7. In its Opinion reported in 219 F. Supp. 922, the Court, by a division of 2 to 1, held that the so-called Federal scheme adopted by the amendment, and freezing the Senate perpetually upon the same essential basis earlier found to be unconstitutional, was constitutional and valid. That denial of equal protection of the laws, as asserted, is the basis of the present appeal. Broadly, then, the questions presented, which must be viewed in the light of the factual statement below, may be summarized as follows:

1. Is the method prescribed for apportionment of the House of Representatives and the Senate of Colorado, and for determination of Representative and Senatorial districts under the above-referred Amendment No. 7, particularly with respect to the Senate, which ignores population as a basis, freezing the Senate Districts basically in accordance with a heretofore condemned scheme, and perpetually separating the districts from a population connection, in violation of the guarantees of the equal pro-

tection clause of the Fourteenth Amendment to the Constitution of the United States?

2. If the said Amendment No. 7 is found to involve a violation of the constitutional guarantees of equal protection under the Fourteenth Amendment, and in view of the fact that the pre-existing provisions of law with relation to the apportionment, districting, and election of the House of Representatives and the Senate of the State of Colorado have been heretofore held to be unconstitutional, then may there be orders entered, and if so what orders, properly to apportion the representatives and senators to be elected to the next general assembly of the State of Colorado?

3. Essentially, in view of the admitted statistical evidence, and the legislative and legal history of apportionment of Colorado, is there a rational basis for separating the Senate in Colorado from population relation, while fully recognizing that such a population must exist for the House of Representatives, and that population equality must exist in multi-member districts of the Senate?

4. Inasmuch as there has purportedly been, by House Bill 65, a reapportionment of House Districts, purporting to be on a population basis, as nearly equal as may be, can there be made by judicial act a similar apportionment of the Senate, the said apportioned House and Senate Districts to be utilized as a basis for forthcoming election, or, alternatively, can affirmative orders be made to the Defendant Assembly and officials requiring, under proper direction of the Court, the making of an immediate apportionment on an actual population basis?

1(e). **Concise Statement of the Case:**

1. In order to determine whether or not there is a constitutional abuse in the presently attempted structure of the Colorado General Assembly, some factual and legal history of the State must be taken into consideration. For these purposes, only those matters comprehended within the record, or clearly involved in statute, need be considered.

History of Colorado as a populated area basically begins with the gold discoveries at Boulder, Golden, and Denver, almost simultaneously, and in the year 1859. For approximately two years, legal organization was informal. Thereafter, and in 1861, there was formed a Territory of Colorado, composed of parts of the existing Territories of Kansas, Nebraska, New Mexico, and Utah.

To this entity, Congress gave effective form by an Organic Act, approved February 28, 1861. The text of that Organic Act may be found in General Laws, 8th Session Legislative Assembly, published at Central City by David C. Collier, 1870. Legislative power was vested in a Legislative Assembly, the immediate precursor of the General Assembly, and formed *wholly upon a population basis*. Section 4 of the Organic Act provides as to that body as follows:

"Sec. 4. And be it further enacted, That the legislative power and authority of said territory shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and a house of representatives. The council shall consist of nine members, which may be increased to thirteen, having the qualifications of voters as hereinafter pre-

scribed, whose term of service shall continue two years. The house of representatives shall consist of thirteen members, which may be increased to twenty-six, possessing the same qualifications as prescribed for members of the council, and whose term of service shall continue one year. AN APPORTIONMENT SHALL BE MADE, AS NEARLY EQUAL AS PRACTICABLE, AMONG THE SEVERAL COUNTIES OR DISTRICTS FOR THE ELECTION OF THE COUNCIL AND HOUSE OF REPRESENTATIVES, GIVING TO EACH SECTION OF THE TERRITORY REPRESENTATION IN THE RATIO OF ITS POPULATION (INDIANS EXCEPTED) AS NEARLY AS MAY BE; and the members of the council and of the house of representatives shall reside in, and be inhabitants of, the district for which they may be elected respectively. Previous to the first election, the governor shall cause a census or enumeration of the inhabitants of the several counties and districts of the territory to be taken; and the first election shall be held at such time and places and be conducted in such manner as the governor may direct; and he shall, at the same time declare the number of members of the council and house of representatives to which each of the counties or districts shall be entitled under this act. • • •

By 1865, there had been prepared an Enabling Act, preparatory to Statehood. That act was approved by the people and by the Congress, but it was vetoed by President Johnson in 1866.

In 1875, there was a further Enabling Act approved by the Congress. That Enabling Act, which appears in Volume 1, 1953 CRS, pages 237 and following, provides

for the holding of a constitutional convention, and, in Section 3, provides that "the aforesaid representatives to form the aforesaid convention shall be apportioned among the several counties in said territory in proportion to the vote polled in each of said counties at the last general election as near as may be." Population, therefore, was again the only basic criterion, measured by voting strength.

In 1876, the State adopted a Constitution pursuant to the Enabling Act. That Constitution (General Laws Colorado, 1877, at pages 44-46), contains essentially the provisions set forth above as the sections numbered 45-47 prior to Amendment No. 7. The Senate, however, then consisted of 26 Senators, and the House of 49 Representatives, Section 48 of the Constitution fixing the original House and Senate Districts. Examination of those districts, and comparison of them with the populations as of the date of the establishment of the districts, reveals that the districting was essentially on a population basis, precisely as the Organic Act had required for the Legislative Assembly prior to Statehood. No different basis essentially existed for the Senate than for the House. Most districts were single-member districts. A few, however, had multiple members, as for example, in the Senate, Arapahoe (which then included Denver), which had 4 and 7 representatives. Several of the mountain mining counties, then heavy centers of population, also had multiple representation.

The Constitution required, in Section 45 above quoted, that "the general assembly shall provide by law for an enumeration of the inhabitants of the State in the year of our Lord 1885, and every tenth year thereafter; and at the session next following such enumeration, and also at the session next following an enumeration made by the

authority of the United States, shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration, according to ratios to be fixed by law."

The original 26 members of the senate were divided, on a population basis, among 20 Senatorial districts, from 1 to 4 members to the district, the districts consisting of from 1 to 4 counties.

The original 49 representatives were divided among the 28 counties on a population basis, only one house district consisting of two counties.

Although there was provided a State Census in 1885 and every 10 years thereafter, and required apportionment of the house and of the senate after each state census and each federal census, a mandatory reapportionment once every five (5) years, there has never been a state census made. The Constitutional provisions were regularly ignored.

Statutes adopted to apportion the State, above referred and quoted at length in Appendix A, operated upon a population basis exclusively, modified by what is called alternatively a "weighted ratio" or "differential ratio" or "multiple ratio." Under the system, each of the established districts is allotted one seat. Additional seats are allowed for additional numbers of population, or fractions of the requisite number, but the number required for additional representation is materially higher than that required for the basic representatives.

Under the existing statutes, Sections 63-1-2, 63-1-3, and 63-1-6, 1953 CRS, printed in Appendix A, the ratio

for the apportionment of the Senate is one seat for 19,000 persons, plus an additional seat for each additional 50,000 persons or fraction of 50,000 more than 48,000. A representative is allowed for the first 8,000 persons, though one county had a representative with fewer than that number of persons in 1960, and an additional seat was allowed for each additional 25,500 persons or fraction over 22,400.

It will be seen that the number required for the initial representative is very low. In the senate, the number required for the next senator is approximately $2\frac{1}{2}$ times the initial requirement, and in the house approximately 3 times the initial requirement.

It was, accordingly, always very difficult for a heavily populated area to obtain any representation in any manner proportional to its population growth. There was, therefore, always a materially excessive representation of rural and mountain areas, particularly aggravated by the exodus of population from the mining areas of the mountains, and the enormous concentrations of population in Denver and the surrounding and suburban areas.

The 5-year state reapportionments, based upon the state census requirement, were wholly ignored. Essentially, Colorado has had little reapportionment. After an original reapportionment of 1881, there were only four reapportionments, those of 1901, 1913, 1933, and 1953. That of 1933 was accomplished, as will be discussed below, by initiated petition, in the face of material legislative opposition. That of 1953 was a token measure only, making essentially no change and giving substantially no recognition to the growth of the metropolitan areas.

1.1. There was admitted in evidence, without ob-

jection, and received by the Court, the United States Population Census of the State of Colorado, 1960. The basic statistical data applicable appears on page 7-10 of that Exhibit (Exhibit 1).

1.2. The following statistical allegations were made and proven, without dispute, from the Census, so admitted by stipulation into evidence:

1.21. The population of Colorado in 1960 was 1,753,947. Each of its 35 senators, therefore, should have represented 50,113 persons, and each of its 65 representatives should have represented 26,984 persons. General population of the state had increased 32.4% over 1950 population, but urban population had increased by 55.5% while rural population actually declined 6.6% during the decennium 1950-1960.

1.22. Population in the most populous Senate District, Jefferson County, was 127,520; that of the smallest Senate District, the 18th, was 17,481. Each citizen in that smaller district, then, was accorded representation approximately eight (8) times that accorded a citizen in the most populous of the senate districts.

1.23. In like manner, a nine-to-one discrimination obtained between the most heavily represented House district and the least heavily represented such district.

1.24. In several districts, both House and Senate, representation was allowed and existed even though there were fewer persons within such districts than the statutorily prescribed minimum for representation.

1.25. 29.8% of the population of Colorado, situate

in its least populous Senatorial Districts, elected a majority of the Senate, and 32.1% of the population, in similarly unpopulated areas, elected the majority of the House of Representatives.

1.26. The larger part of the population of Colorado now lies in a north-south strip along the Eastern Slope and cordillera of the Rocky Mountains, running from Boulder in the North to Pueblo in the South. The largest part of that population is in the Denver metropolitan area, consisting of the City and County of Denver, the surrounding "Tri-County" area of Adams, Arapahoe, and Jefferson Counties, and the closely adjacent Boulder County.

The Denver Metropolitan area was grossly misrepresented or under-represented. On average, a senator from one of the seven most populous districts in the State represented 90,309 persons, very nearly twice the number of persons proper as shown in 1.21 above, while from one of the eighteen least populous districts, electing the majority of the Senate, a Senator represented on average 39,013 persons, nearly a 3 to 1 adverse differential.

In the immediate metropolitan area, Denver itself was favored over the surrounding Adams, Arapahoe, and Jefferson Counties in the ratio of 2 to 1. Similar conditions prevailed both in the House of Representatives and in the Senate.

These conditions existed under the existing statutes, which were found to be basically invalid.

1.3. No question factually was raised or has ever been raised as to the reality of this distortion, and the

Three-Judge Court unanimously, and on page 6 of its Memorandum Opinion (reported in 208 F. Supp. 471) said:

"Factual data presented at the trial reveals the existence of gross and glaring disparity in voting strength as between the several representative and senatorial districts. Colorado's present population determined by the 1960 federal census, is 1,753,947. During the decade from 1950 to 1960 there was a percentage increase amount to 32.4. During this period the urban areas increased 55.5 per cent, and there was a decrease in the rural areas amounting to 6.6 per cent. The population in 36 of the 63 counties decreased. Some specific examples of the disproportion are here mentioned: The most exaggerated example is in a district (having a single representative) which was shown to have a population of only 7,867 as compared with another representative district (having two representatives) for a population of 127,520 people. Similar disparity exists in the senatorial districts. A single senator represents a district of 127,520 people, while another senator has 17,481 people in his district. A senator from one of the seven most populous districts represents on the average 90,309 constituents; a senator from one of the eighteen least populous districts represents on the average 29,013 persons. A representative from one of the seven most populous districts represents on the average 46,342 while a representative from one of the twenty-eight less populous districts represents an average of 15,993 persons. Also noteworthy is the fact that 29.18 per cent of the 1960 population is capable of electing a majority of the Senate, and 32.1 per cent of the population is capable of electing a majority in the House of Representatives. Stated differently, it can be said that 462,741 persons elect 33 representatives, a majority, whereas 1,190,300

persons elect 32 representatives, a minority of the House. Similarly, in the Senate 556,912 voters elect 19 of the 35 senators, whereas 1,207,035 elect the remaining 16 senators.

"The inevitable effect of the present Apportionment Act has been to develop severe disparities in voting strength with the growth and shift of population. It provides that the ratio for the apportionment of senators shall be one for each senatorial district for the first 19,000 of population and one for each additional 50,000 or fraction over 48,000. The ratio fixed for the House is one representative for the first 8,000 of population and an additional representative for each additional 25,00 or fraction over 22,400 of population. The inevitable consequence of these ratios is the kind of disparity which now exists."

2. The original action instituted was tried and finally disposed of in a one-day session on August 10, 1962. The Trial Court of Three Judges rendered a unanimous per curiam opinion. That Opinion as above referred is reported in as *Lisco vs. McNichols*, 208 F. Supp. 471. There was then pending an attempt to amend the Colorado Constitution. Proponents of several amendments were in the field, one being called Amendment 7 and the other Amendment 8. It is improbable that either one would satisfactorily have corrected the situation. The parties here involved, in any case, were not and are not proponents of any amendment, but appear entirely to sustain the thesis that there is under the equal protection and due process clauses of the Fourteenth Amendment, and as an incident and corollary of the right of franchise, a right to equal and equally weighted franchise. The politics of amendments 7 and 8, so carefully considered in its final opinion

by the trial Court, are not preponderating circumstances in this appeal.

3. The Trial Court, during trial, admitted as intervenors those individuals who were the principal backers of Amendment 7. Most of the testimony put in at the trial was identical with the testimony subsequently entered before the final Opinion, to the effect that if Amendment 7 were adopted, the Senate provisions would be reasonable provisions. The Court, despite that testimony, which does not differ in substance or in quality from the testimony upon later trial, held to the invalidity and irrationality of the existing arrangement and hence, to the invalidity of the Senate Arrangements under proposed Amendment 7, since that Amendment, by express terms, freezes the existing statute, simply adding 4 Senators, and giving one of them to each of the Counties of Adams, Arapahoe, Jefferson, and Boulder. Proponents of Amendment 7 fully participated in every stage of the trial and presented at the initial hearings full data in support of their proposed arrangement.

3.1. The Trial Court held the existing arrangements to be invalid, stating in the Memorandum Opinion:

“We recognize that a statute is presumed constitutional, and that he who attacks the constitutionality of a statute bears a heavy burden. The population statistics presented by plaintiffs and challenged by no one, show the disparities we have heretofore noted. They are of sufficient magnitude to make out a prima facie case of invidious discrimination which rebuts the presumption. Accordingly, the defendants were obliged to show that there exists some rational basis for these disparities.

"To sustain the rationality of the present districting of the Colorado General Assembly we are left with those facts which may be judicially noticed. We know that Colorado is a large state having two counties with an area of over 4,000 square miles and a number of counties of more than 2,000 square miles in size. We know that the east half of the state is a land of plains and west half a land of mountains. The population is now concentrated in the metropolitan centers of Denver, Pueblo and Colorado Springs, all located in a narrow strip east of the Continental Divide. The economic interests of the farmers and the miners, the stock raisers and the oil producers, the merchants and the consumers, the employers and the employees, industry and recreation, the mountains and the plains, the large cities and the small towns have many differences. The Colorado statutes reflect that traditionally the districting of the legislature has favored certain areas with great emphasis on mining counties which was changed, at least partially, by the 1932 initiated measure which increased the representation of the eastern farming counties. We know, too, that in the last twenty years the population has become more and more concentrated in the metropolitan areas.

"These matters of general knowledge may justify disparities in legislative districts. They do not, of themselves, sustain the rationality of the legislative districts as they now exist. Reliance on generalities is misplaced when a case must be decided on the basis of specific situations."

4. The Court deferred final action until after the then-impending November elections.

5. At the November, 1962, election, there was adopted

the so-called Amendment 7, the text of which appears above.

6. Following those elections and that adoption of Amendment 7, amendment and supplementing of the pleadings was permitted. There were filed in each of these consolidated actions Supplemental Complaints, part of the record herein, raising constitutional questions under the Fourteenth Amendment, occasioned by the adoption of Amendment 7. The Supplemental Complaint of the Appellant Lucas incorporated the allegations of the Complaint, and made parallel objections to the provisions of Amendment 7. Essentially that Amendment provides for a House of Representatives of 65 members, to be elected from districts "as nearly equal as may be", and to be decennially reapportioned, each member to be elected from a single-member district. It provides for a Senate of 39, rather than 35, members, the 4 additional members being arbitrarily assigned to Adams, Jefferson, Arapahoe, and Boulder Counties, one to each county. The other senatorial districts remain fixed in the same manner as provided by those statutes previously and in the Memorandum Opinion declared to be irrational and violative of the principles of equal protection. The Senatorial districts are perpetually frozen, regardless of population or population change. If, however, the districts are multi-member districts—most of them being single-member districts—then the multi-member districts are to be decennially reapportioned upon the basis of population. The statutes, declared void by the Memorandum Opinion, in direct contemplation of Amendment 7, is incorporated referentially in that Constitutional Amendment, and prohibited to be repealed or modified, as regards most of its salient particulars.

6.1. In the Supplemental Complaints it is alleged that

the Amendment is wholly invalid in that it accepts and recognizes the principle of equal representation as to the House of Representatives; attempts to deny the validity of that principle generally, as to the Senate, but excepts the multi-member districts in the Senate, to which is applied a rule of apportionment as nearly in accordance with population as may be. The Senate is frozen in perpetuity upon the basis of an incorporated apportionment statute declared by the Three-Judge Court unanimously to be "irrational" and without fundamental historical or other basis in fact or law. The Supplemental Complaints have urged that perpetual separation of the Senate from a connection with population is impermissible; that distinction between the single-member rural districts and the multi-member urban and metropolitan districts within the Senate provisions is totally capricious; and that, resultantly, Amendment 7 is as a whole arbitrary, capricious, and invidiously discriminatory. This is particularly urged by reason of the fact, that from the Organic Act of the Territory until 1962, Colorado has never recognized any basis for the formation of districts or for the selection of either the House or the Senate except population, and no basis other than population exists or has ever existed in Colorado for such districting or selection. Accordingly, it is urged, Amendment 7 is void, and, the pre-existing arrangement of statute being already declared void, judicial action to require proper apportionment is requisite.

6.2. Under the facts as developed from unquestioned statistics, the distinctions made in the Senate under Amendment 7 are invidious, discriminatory, and without basis in history, logic, or reason:

6.21. The least populous Senate district under the

amendment is permitted one Senator for 18,414 persons. In the most populous district, one senator represents 71,871 persons. That situation is frozen perpetually. The favored district is one which is decreasing in population and has steadily so decreased for many years. The district discriminated against is one which has gained continually in population and, being in the immediate Denver area, must continue to do so, so that the distortion, now severe, must over even a short period of time become shocking and, protracted, unconscionable.

6.22. Under Amendment 7, 460,620 persons elect 19 members of the Senate. 1,203,328 persons elect only 20 members of the Senate. Effectively, one-third ($1/3$) of the population controls the Senate and hence controls legislation in Colorado. There is no dispute in the evidence that such is the case, nor is it disputed that such is designed perpetually to be the case, although it is likely that the disparity will progressively increase.

6.23. Historically, the mountain and rural population of Colorado has tended continually to decline. Urban population of the Denver area and a strip of territory extending along the base of the Mountains, from Denver to Colorado Springs, has continually increased. The Amendment was intended to prevent representation of the majority of the population by a majority in the State Legislature and was purposed forever to prevent majority control of that body.

6.25. Proponents of the Amendment, and the Appellees generally, have admitted that the Amendment does not constitute or attempt to provide for apportionment in accordance with the principle of equality of representa-

tion as of right, for they argue that there is no such right. They admit that the Amendment was purposed, intended and designed to prevent representation on a population basis and to vest a controlling function perpetually in a clear minority of the population, described by the majority opinion of the trial court as representing "insular" interests, which are in this manner given and intended to be given perpetual legislative control, or at least perpetual veto right over legislation, in the State of Colorado.

7. In its Opinion above referred [219 F. Supp. 922], two members of the Trial Court have upheld these contentions, specifically holding that the "special interests" or "insular" interests of minority geographical or economic groups in Colorado are such as to justify legislative distortion and its perpetuation. The Majority Opinion holds that representation strictly in accordance with population would accord such special groups insufficient legislative voice and that, accordingly, inasmuch as majority approval of a constitutional amendment has been obtained, a Senate separated from population base is permissible.

7.1. Appellants have strongly contended that no vote of the population of a state, no matter by what majority, may abrogate the provisions of the Constitution of the United States, nor may such vote allow deprivation of any part of the citizenry or any citizen of equal protection of the laws.

7.2. As recognized in the unanimous and first Memorandum Opinion of the Trial Court, the Colorado Legislature has historically refused to follow the Constitutional obligation to apportion upon the basis of population, and such failure was itself unconstitutional. Amendment 7 was

admittedly sponsored only for the purpose of avoiding majority control in the Senate, and for the purpose of freezing the Senate effectively upon the pre-existing basis, though that basis was held unconstitutional. It is the position of the Appellant that the only representation possible under the Constitution, in a state legislative assembly, is representation of *people*. Under our constitutional scheme, there is no specific representation of "interests", whatever those may be, nor however much some may esteem them. It is contended that there cannot be a validation of an unconstitutional arrangement simply by popular sanction at the polls. The limitations of the Constitution of the United States are in their essence, it is argued, protections of the individual against the many and of the citizen against the State. Constitutional limitations are limitations upon power, and specifically upon the power of the majority to trespass beyond permitted bounds. Fundamentally, Appellants submit that the Majority Opinion below is an abdication of the principle of individual equal protection of the laws; and that the right of any single individual to equal protection of the laws, under the Constitution of the United States, and as reflected in his electoral equality transcends the economic "interests" of any group or area.

8. There is filed a Dissenting Opinion by Judge Doyle. In it he specifically points out that Plaintiffs below (here Appellants) were held in the Memorandum Opinion to have established a *prima facie* case of unconstitutionality against the protested measures and systems. He observes that no logical basis exists upon which to distinguish between the Senate and House of Representatives, and that the equal protection clause applies to both, there being no analogy to the Congress of the United States, as discussed by this Court in *Gray vs. Sanders*, 83 S. Ct. 801.

8.1. That dissent further urges the principle of *Simcock vs. Duffy*, 215 F. Supp. 169, that "an apportionment should not be permitted that would allow a blockage of major legislation desired by the great majority of the electors of Delaware to come to pass in the Senate. Effecting the will of the majority of the people of a State must be deemed to be the foundation of any apportionment plan." It is further urged, as concerns the validity of Amendment 7, that "the unpleasant truth is that it was particularly designed and dictated not by factual differences, but rather by political expediency. Simplicity and success at the polls overrode the considerations of fairness and justice. Thus, Amendment No. 7 fails the test of rationality in its adoption."

9. Historically, there is no evidence to support the theory written into Amendment 7. In Colorado, representation has never existed, nor apportionment been authorized to be made, prior to Amendment 7, upon any basis other than population, however flagrantly the Colorado legislature has sought to ignore that requirement.

9.1. The Majority Opinion emphasizing that it is unimportant that the distortion of the Senate is perpetual, since it points out that the Constitution may again be amended one day to correct the problem. Amendment of a Constitution is a laborious and fantastically expensive matter. The fact that an amendment, capable of accomplishment through a process which no individual could essay, might one day restore equality is meaningless to the individual voter whose vote is negated by the present Amendment. Such argument, it is urged, is lip service only to the Fourteenth Amendment, paramount in our Constitutional scheme, rendering worthless the guarantee of individual equality under law established thereby.

9.2. The Majority Opinion argues that "insular" economic interests, specifically named in that Opinion, require the allowed 2½ to 1 majorities over interests of the majority of the people, resident in the urban areas, in order adequately to protect those "insular" interests against that majority. The Constitution of the United States does not contemplate representation of mines nor of mountains, of plains nor of cattle, nor of the rivers which water them. It contemplates only representation of people; of each one equally, whether he be a miner; farmer, grazier, urban resident.

10. Accordingly, Appellants have argued below and here again argue and submit that it has been clear since the Civil War that no State, no group of persons within a state, nor even a majority of the electorate of any State, may cast off the protections guaranteed by the Constitution of the United States to any individual citizen. Amendment 7 in this regard has no more status as law than the Acts of Nullification and Secession. It is submitted, as Appellants believe, that in *Baker vs. Carr* this Court has announced a basic element in that charter of freedoms it has so carefully engaged to formulate. The basic tendency of suffrage in the free world has been to the accomplishment of fundamental voting and political equality between individual human units. If artificialities of the kind implicit in Amendment 7 are to be upheld, then it is submitted that the entire implicates of the doctrine of individual worth and freedom promulgated by this Court are subject to subversion, not only as to the suffrage but as to any other right this Court has sought to guarantee. The majority is often quite willing to subvert the right of the individual. The entire notion of civil right is that

it legally may not so do. For these reasons it has been urged that Amendment 7 is void.

SUMMARY OF ARGUMENT

The legal argument of the Appellants may be summarized as follows:

1. Citizenship in the United States and in the State of Colorado carries, as one of its basic and inalienable rights, equality of franchise and of vote. Such equality is implicit in the entire electoral history of the United States and in the judicial pronouncements under the Fourteenth Amendment.

2. As a corollary of the above, equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, applied to representation in State legislatures, requires that each citizen be represented as equally as practicably may be in the legislature of his State. If his vote must be equal, it can be so only if it have equal representational effect.

3. Challenged Amendment No. 7 recognizes the requirement of equality as regards the House of Representatives. House Bill No. 65, as demonstrated by the series of appended Exhibits, parts of the Brief of the Amicus Curiae below, demonstrates that little impracticality results from an attempt to establish electoral equality. Amendment 7 categorically rejects the principle of equality in the Senate, insofar as concerns the rural and minority single-member constituencies. These are frozen, and given perpetual control of the Senate, though admittedly based on an unconstitutional State Statute. The

population principle is accepted within the multi-member constituencies in the urban areas. Future amendment of Senate districts is prohibited, but strict population distribution within the multi-member districts is enjoined.

4. No rational basis exists for the distinction made between the House of Representatives and the Senate as regards the requirement of equality of representation based on population, and no rational basis exists for the differentia made between single-member rural districts and multi-member urban districts.

5. There is no historical parallel between Colorado Counties and the original States, nor between the state House and Senate and the House and Senate of the United States, such as to justify a difference in basis of selection between the House of Representatives and the Senate of Colorado.

6. Historically, there exists and has existed prior to Amendment 7 no basis for apportionment in Colorado other than population.

7. There has been clear judicial declaration that the statutes, frozen in effect as to the Senate by Amendment No. 7, are themselves without rational basis and unconstitutional as violative of the Fourteenth Amendment.

8. The clear purpose of Amendment 7 was to create a second chamber of the General Assembly, separated from population foundation and frozen in composition, having capacity of perpetual veto over any act of legislation which might be favored by the urban and suburban majority of the Colorado population, in order to offset entirely the lip service given population in the House of

Representatives. Amendment 7 is a deliberate and purposed subversion of the principles of equal protection of the laws and equality of suffrage. As observed by the dissenting Judge below, "the unpleasant truth is that it was particularly designed and dictated not by factual differences, but rather by political expediency. Simplicity and success at the polls overrode the considerations of fairness and justice. Thus, Amendment No. 7 fails the test of rationality in its adoption."

9. The fact that Amendment 7 took the form of a constitutional amendment sanctioned by the majority casting votes at the election in which it is adopted gives it no validity whatsoever. The problems here involved, involve the Constitution of the United States, the Fourteenth Amendment, and equal protection of the laws. That Amendment derives from the Civil War. It was designed to prevent rampant majorities depriving minorities or individuals of basic rights. Constitutional guarantees are limitations upon majorities of the electorate as well as upon governments. Whatever considerations or means may have induced persons voting in Colorado to sanction Amendment 7, those persons so voting cannot, no matter how many they be, limit rights guaranteed under the Constitution of the United States, nor can that supposed voter sanction justify the clear half-century abuse by the Colorado Legislature of its statutory and constitutional duty.

10. Tremendously serious damage results, both to individuals and publicly, because of distortions in legislative representation such as that transpiring in Colorado. The individual is of course damaged, since he is in point of personal dignity and right demeaned below others,

sometimes overwhelmingly, simply by virtue of residence in an urban or suburban areas, as contrasted with a rural one. Indeed, in the present action, one of the principal witnesses for the Defendants and Intervenor specifically stated that rural people were better people than those living in the cities or suburbs and deserved, accordingly, governmental preponderance. Beyond this, the state legislative process itself obviously deteriorates during any such process, since those persons who preponderantly contribute financially to the State government are more and more completely separated from the benefits of their contributions. If there be a legislative bifurcation, such as attempted in the Colorado scheme, whereby the Senate is given effectively a rural veto power, then there is the sad process of legislative stalemate, or of total disagreement between legislative and executive arms of government, the executive in such case being generally elected from and by the majority, denied representation in the legislature. So frustrating does this become and so inefficient in governmental point of view, that major functions of the State are of necessity neglected, leading to a deteriorating federal system and an unreasonable preponderance of the Federal Government in local affairs, accomplished by default of the local institutions themselves which, disassociated from reality, seeking to protect "insularity" of interest, as advocated in the Majority Opinion, must fundamentally cease when separated from the needs of the majority effectively to govern at all. Significant as our Federal Government is, it is a tragic thing that federalism may be destroyed by non-representative composition of the State legislative bodies.

11. No need exists for the distortion involved, since there can readily be made an apportionment of both

houses, fulfilling every proper requirement of territorial and population representations, with but little effort.

ARGUMENT

Argument has been had, upon extensive briefs and briefs of amici curiae, filed heretofore in Numbers 20, 29, 23, 27, 41, and 69, October Term, 1963, which, aggregately, present many of the questions fundamentally underlying consideration of the Colorado cases. In the Briefs in those matters have been presented much of the matter which in other circumstances would have comprised the bulk of this presentation. Particularly in the Amicus Curiae Brief submitted on behalf of American Jewish Congress, American Civil Liberties Union, and NAACP Legal Defense and Educational Fund, Inc., there is presented much of the general case law and historical background apparently pertinent to the consideration of these questions.

Because those matters have been extensively before the Court quite recently, we will not here repeat in detail, but will endeavor to confine ourselves to a general outline of certain of the propositions in those other matters detailed, and to particular reference to the Colorado problem. That problem, we submit, presents in clearcut and inescapable form the basic question whether equal protection of the laws does indeed include true equality of franchise, and whether state electoral majorities may vitiate the guarantees of the United States Constitution.

We believe and submit that the questions of franchise, with the segregation decisions, raise the most significant civil liberties questions to be presented to this Court and nation since the Civil War, and submit that the impli-

cations of all constitutional decisions culminate in a recognition of the basic integrity of the individual citizen; of the necessity for its rigid protection by constitutional mandate; of the logical imperative of the proposition "one man, one vote" as fundamental to the whole of the fabric.

A. EQUALITY OF FRANCHISE AND OF VOTE IS IMPLICIT IN THE ELECTORAL HISTORY OF THE UNITED STATES, AND CORRELATIVELY EQUAL PROTECTION OF THE LAWS, APPLIED TO LEGISLATIVE REPRESENTATION, LEADS ESSENTIALLY TO THE THESIS "ONE VOTER, ONE VOTE".

Franchise is an evolving process, intimately connected with the democratic process and with the constitutional theory of civil right as an area of inviolable personal sanctity, whether against incursion by other individuals, massed individuals, or the state itself. Currently, numerous proceedings are in progress in the Courts of the United States and before this Court to determine in essence whether real equality of franchise is essentially involved in equal protection of the laws. Impetus has been given the process by the massing of population in large urban centers, by constant decrease in the importance of the rural areas of the United States in point of population, while those same areas remain politically dominant in state legislative bodies by reason of perpetuated representation out of proportion to present populations.

These problems, while currently most pressing, are not without historic parallel. They result inevitably from change in population focus and modes of existence. The earliest

such problems arose in this country in Virginia, shortly after the Revolution, by reason of the shift in population from the tidewater areas and cities into the Piedmont and plantation areas. Reform was eventually accomplished, leading to a rural-based legislature, which renewed population change and passage of time has now outmoded, as shown in *Mann vs. Davis*, an action in which on November 28, 1962, the 3-judge court assembled at Alexandria declared the existing Virginia apportionment inoperable and void, and leading to No. 69, October Term, 1963, now before this Court.

When, following the Revolution, migration from coastal colonies and states led to settlement of the old Northwest Territory, settlement was almost entirely agricultural. Cities did not become prevalent in our present mid-continent until the middle of the 19th Century, immediately prior to and immediately following the Civil War. Accordingly, legislative representation was primarily granted to rural counties, remained logical in a sense even up to World War I, when Rural America was in fact typical of the United States, and has become entirely an archaism in present day metropolitan America.

In Colorado, population was initially localized in mining areas, and subsequently spread to the plains with the growth of importance of cattle ranching and the growing of wheat. Population has long passed from the mining counties. Wheat and cattle are but secondary aspects of the State economy. Two-thirds of the population of the State resides in the 7 urbanized counties, and most of that in the immediate vicinity Denver, Colorado Springs, and Pueblo, in a long, thin, inhabited chain of land along the west slope of the mountains, one of the thirty great metro-

politan centers into which American population is rapidly being agglomerated.

Because for a period, described by Mr. Steffens and the "muckrakers", the exuberant economics of the city led to certain moralistic abuse, opponents of rational suffrage have argued that the city is "wicked and corrupt" and that suffrage must be more emphatically granted the "purer" rural areas. We shall in this brief but little refer to the oral testimony of the Intervenor's witnesses, for it has but little pertinence to any matter before the Court. We do note, however, that a principal witness, Dean Rogers, specifically advocates in this case the thesis of weighted votes for the rural voter who is a "better" person than his city neighbor, a questionable thesis, and certainly one not constitutionally acceptable. Peonage of the city to the rural areas was sought to be justified for many years on the thesis that the mores and customs of the city were in some manner alien, and those of the rural area more uniquely "American" in content. When, however, nearly 70% of the population of the country is urban, and when within a decade that proportion will have risen to 90%, it would appear that it is the rural mores, if they be deviant from those of the city, which are non-representative.

Following World War II, it became manifest that no argument denigrating the importance of the Urban area could be sustained. 30 metropolitan centers contain three-quarters of our population. Demographers estimate that by 1970, 90% of the population will dwell in those same areas. Of those areas, the Denver metropolitan area is a principal one.

History manifests the fact that as areas cease to have

economic and functional importance, either in an absolute or a relative sense, there is a tendency to plead that their status must be preserved upon some "historical" grounds.

England, as well as the United States, has been faced with the problem of representational reform. In the 1830's, events culminated in the Great Reform Bill, extirpating representation of the "rotten boroughs" or "pocket boroughs", which were but once-flourishing areas from which population had withdrawn, and whose representatives sat in Parliament for comparatively minute numbers of persons, Old Sarum constituting a constituency with a member for three inhabitants only, while such cities as Birmingham, Manchester, and most of the centers of the industrial "Black Country" and Midlands remained without representation and effectively disenfranchised. Sarum was once a seaport, from which the sea withdrew; it was a cathedral city, which gave its name to a liturgical rite; but by 1830 it was but an historical anachronism, which might not claim representation when its population had gone and nought but its history remained. Representatives stand for people and not for history. Legislators assembled do not stand for geographical areas as such, nor economic interest as such, nor historic remembrance, as remembrance only. Legislators represent only *people*. When the people have gone, their representation must cease, and where they have gone, that representation must follow.

If "rural America" no longer typifies the United States, and most clearly it does not, then conversely the problems of the United States and of most of its states are primarily metropolitan problems, and those who must cope with such problems must be representative of the

population, predominantly metropolitan in its locus and approach. The thesis that dominance must continue from the former great mining areas, from the cattle regions of the plains and the market town in the counties, is a thesis which, emotionally appealing though it may be to some, we respectfully submit is without maintainable constitutional foundation.

B. HISTORICALLY THERE EXISTS AND HAS EXISTED IN COLORADO NO BASIS FOR LEGISLATIVE REPRESENTATION OTHER THAN POPULATION.

Prior to the purported adoption in November, 1962, of Amendment 7, Colorado has never had basis for legislative apportionment and representation other than a population basis.

As stated above in the Statement of the Case, Colorado history practically dates from discovery of gold at Boulder, Golden, and Auraria (now Denver), in 1859. After two years of informal government, Colorado became in 1861 a Territory, under an Organic Act, approved February 28, 1861, and providing for a "legislative assembly", comprised of two houses, a council and a house of representatives, consisting of 9 members and 13 members respectively. For their election it was required that "an apportionment shall be made, as nearly equal as practicable, among the several counties or districts for the election of the council and house of representatives, giving to each section of the territory representation in the ratio of its population (Indians excepted) as nearly as may be."

During the entire territorial period, representation

was wholly on a straight population basis, in *each house* of the assembly and no variation between the houses was sanctioned.

In 1875, there was approved an Enabling Act, providing for a constitutional convention, and requiring that its representatives "shall be apportioned among the several counties in said territory in proportion to the vote polled in each of said counties at the last general election as near as may be", so that population again was the only guiding consideration.

In 1876, the State adopted a Constitution, pursuant to that Enabling Act, which also required the State to recognize the 14th Amendment and its principal of equal protection of the laws. Its provisions called for a Senate of 26 members and a house of 49 members, and its sections specifically divided the state into districts for the election of members of the house and of the Senate. Examination of those original districts demonstrates them to have been in essence the old council and representative districts under the Territorial Organic Act, based on population and nothing else. Most of the districts established were single-member districts. A few districts, the more populous, had multiple members. The 26 members of the Senate were divided on population basis among 20 senatorial districts, having from 1 to 4 members per district, and each district comprising from 1 to 4 counties. The original 49 representatives were distributed among 28 counties on a population basis, only one district consisting of two counties.

Section 45 of Article V of the Constitution, obtaining from its adoption until 1962, provided that "the general assembly shall provide by law for an enumeration of the

inhabitants of the State in the year of our Lord 1885, and every tenth year thereafter; and at the session next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration, according to ratios to be fixed by law."

The State census required was never taken, and the constitutional provisions on apportionment were regularly ignored by the rural dominated Assembly.

No standard for apportionment existed except a population standard, but it was a badly juggled one. Under the existing statutes, frozen perpetually into being by Amendment 7, the ratio for apportionment of the Senate was one seat for 19,000 persons, plus an additional seat for each additional 50,000 persons or fraction of 50,000 more than 48,000. Similarly, one representative was allowed for the first 8,000 persons and an additional one for each additional 25,500 persons or fraction over 22,400. Some districts were allowed Senate and House representation without even the minimum population. The initial requirement was low, and incremental requirements very high proportionally, resulting in little change as population of the urban areas increased. Populated regions could not obtain representation in any manner proportional to population growth, and rural and mountain areas were always, as compared to the populated areas, over-represented.

Not only so, but the State has had little apportionment, there being only four reapportionments of meaning after the original reapportionment of 1881, being in 1901, 1913, 1933, and 1953 respectively. In 1933, the urban areas

were ignored, in favor of the wheat and cattle regions, which obtained much of the representation which had formerly gone to the mining areas. In 1933, moreover, the reapportionment was accomplished only in the face of the legislature, through initiated act and Court declaration, and not because of the legislature. In 1953, the measure was of token significance only, making few changes, and giving no recognition of moment to the growth either of the urban area or the surrounding suburbs.

Armstrong vs. Mitten, et al., 95 Colo. 425, 37 P.2d 757, is the leading Colorado decision on apportionment. On July 2, 1934, the Colorado Supreme Court voided Chapter 156, Session Laws of 1933, as violative of Article V, Section 45, of the State Constitution. A census was taken under Federal auspices in 1930. In 1931, the Assembly did nothing to reapportion, and in 1932 an initiated measure was popularly adopted. In 1933, the Assembly enacted the voided act, differing widely in the method of apportionment from the initiated act.

The Colorado Supreme Court recognized, on page 428 of its official report, that population is the basis of representation in Colorado: "The legislative act attempts to confer upon some districts a representation that is greater, and upon others a representation that is less, than they are *entitled to* under the Constitution." The words "entitled to" indicated as patently as words may do a vestiture of right. The right is vested, the entitlement is based, on *population* of the subject area at the time of the pertinent apportionment, and on nothing else.

The Court specifically remarked that Denver was entitled to 8 Senators, but received only 7, and noted that

Rio Grande, Saguache, and Mineral counties are grouped together representatively, "and although their combined population is less than 17,000, the District is given one senator, although it would require the addition of at least one more county to give it a population to entitle the district to one senator."

We have noted, as has the Trial Court in its initial Memorandum Opinion quoted above, that this kind of distortion, representation with below minimum population, continues to obtain both in the Colorado House and Senate.

The Colorado Supreme Court thus recognized that representation in Colorado was not upon any "historical" basis. It was, even in the 'thirties, recognized to be on the basis of population alone, the criticism being that the outlawed district did not have "*population sufficient to entitle the district to one senator.*" Similar criticisms were made of the House. The Court declared the Act of the legislature void because "it is so honeycombed with unconstitutional provisions as to render it void."

The Court further stated: "The people, by section 45, supra, command the general assembly to revise and adjust the apportionment at the session next following the census. The command is clear and explicit and the people, in inserting it in the Constitution, intended that it should be obeyed. A census was taken in 1920 and another in 1930; but the general assembly, although it met in 1921, 1932, 1925, 1927, 1929, and 1931, failed at those sessions to obey that constitutional mandate. Because of that neglect, the people in 1932 took the matter into their own hands and adopted the initiated reapportionment act. It was not until the people had acted that the general assembly attempted

to perform its duty, with the result already shown in this opinion."

There were again censuses in 1940, 1950, and 1960. The General Assembly was in session in almost every year between them. It did nothing, in effect, to reapportion.

The Trial Court, in its initial Memorandum Opinion, stated: "The record discloses that since Colorado first achieved statehood there has been a modicum of apportionment, either real or purported, and also that there have been several abortive attempts. Since 1876 the General Assembly has been reapportioned, or redistricted, five times: in 1881, 1901, 1913, 1932 and 1953. The 1953 statutes are now in effect. Measures were introduced in the last General Assembly to reapportion with reference to the 1960 federal census report. These measures failed to pass. One initiated reapportionment act has been passed during the period since 1876. This measure was adopted in 1932, but following its adoption the General Assembly passed its own legislative reapportionment act in 1933, which was designed to thwart the initiated act. This latter act was held by the Colorado Court to be unconstitutional."

The Court therefore adjudged the entire Colorado situation to be unconstitutional, and deferred action further pending election. As the General Assembly tried to thwart constitutional reapportionment in the 'thirties, the cattle and mining and rural interests, by using the politically attractive bait of separate constituencies in the multi-member districts, sought to thwart reapportionment at the hands of the Courts, and to deny the population principal by enacting Amendment 7 in the face of Colorado legislative history.

C. THE RECENT DECISIONS OF THIS COURT
BRING EQUALITY OF REPRESENTATION
WITHIN THE PROTECTIONS OF THE FOUR-
TEENTH AMENDMENT.

A new dimension of reality was added to the matter of state legislative apportionment and representation by decision rendered by this Court in *Baker vs. Carr*, 369 U.S. 204, 82 S. Ct. 703, when it became apparent that a situation such as that extant in Colorado was offensive not only to the express provisions of the Constitution of Colorado, but in circumstances such as indicated, persons in under-represented areas were denied the equal protection of the laws afforded them by the Fourteenth Amendment to the Constitution of the United States, "BY VIRTUE OF DEBASEMENT OF THEIR VOTES."

If debasement of the vote is a denial of equal protection, then there must be a "base" or unit for the vote. If one vote can be "debased" below another, then it follows that votes must be equal in effect. If so, there cor-
relatively follows the principle "one man, one vote."

In *Baker vs. Carr*, this Court held: "In the light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to relief, and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee Apportionment statutes. Beyond noting that we have no cause at this stage to doubt that the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what

remedy would be most appropriate if appellants prevail at the trial."

Following the *Judicia* of *Baker vs. Carr*, relief was sought from the Colorado Supreme Court in *Stein etc. vs. The General Assembly, etc.*, Colo., 374 P.2d 66 (No. 20240, July 6, 1962). The Colorado Court agreed that it had jurisdiction, stating: "From all that appears, both in the petition and the memorandum brief of petitioners, the parties are entitled to call these matters to the attention of the court. In at least a half dozen cases, commencing with *Baker vs. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed. 2d 663, the Supreme Court of the United States has made this plain."

Unfortunately, the Colorado Court literally avoided deciding any issue, and ignored the problem of the Fourteenth Amendment, discussing instead its concept of the precise time when the General Assembly, which had not acted for some thirty years, would be required to act.

Justices Moore and Frantz vigorously dissented, pointing out that "it is fundamental that the duty of this Court is to uphold the constitution of both Colorado and the United States. It is equally fundamental that a statute shown to be in violation of either constitution, such a statute is void, and this court has the duty to so declare."

It is interesting to note that the dissent was written with the possibility of Amendment 7 fully in view, for its supporters intervened in the Stein Case and argued their prospective position fully to the Court.

Because of the failure of the Colorado Court to act, Messrs. Myrick et al., including present Appellants, insti-

tuted actions before the United States District Court. Supporters of Amendment 7 intervened, claiming absence of jurisdiction among other things. In the Memorandum Opinion, 208 F. Supp. 471, the District Court disposed of the jurisdictional contentions, and made those extensive findings hereinabove quoted. The Trial Court then held the existing Colorado statutes unconstitutional, saying in the Per Curiam Opinion (at pages 8-10):

"We recognize that a statute is presumed constitutional, and that he who attacks the constitutionality of a statute bears a heavy burden. The population statistics presented by plaintiffs and challenged by no one, show the disparities we have heretofore noted. They are of sufficient magnitude to make out a prima facie case of invidious discrimination which rebuts the presumption. Accordingly, the defendants were obliged to show that there exists some rational basis for these disparities.

"To sustain the rationality of the present districting of the Colorado General Assembly we are left with those facts which may be judicially noticed. We know that Colorado is a large state having two counties with an area of over 4,000 square miles and a number of counties of more than 2,000 square miles in size. We know that the east half of the state is a land of plains and the west half a land of mountains. The population is now concentrated in the metropolitan centers of Denver, Pueblo, and Colorado Springs, all located in a narrow strip east of the Continental Divide. The economic interests of the farmers and the miners, the stock raisers and the oil producers, the merchants and the consumers, the employers and the employees, industry and recreation, the mountains and the plains, the large cities and the small towns have many

differences. The Colorado statutes reflect that traditionally the districting of the legislature has favored certain areas with a great emphasis on mining counties which was changed, at least partially, by the 1932 initiated measure which increased the representation of the eastern farming counties. We know, too, that in the last twenty years the population has become more and more concentrated in the metropolitan areas.

"These matters of general knowledge may justify disparities in legislative districts. They do not, of themselves, sustain the rationality of the legislative districts as they now exist. Reliance on generalities is misplaced when a case must be decided on the basis of specific situations."

The pre-trial Order of the Court continued in effect the previous evidence and made part of the record all of these proceedings. A prima facie case had been held to be established. The defense produced no further case than at the first trial. Its only addition was a massive study, Exhibit D, which its authors, certain persons at the University of Denver, specifically testified was not intended to justify any particular pattern of legislative representation, but which was simply an economic study of the State. Each witness testified he could not find any particular pattern in the existing legislative districts. Yet they were adopted by Amendment 7, frozen in perpetuity, and suddenly transmogrified in the minds of the majority of the Trial Court from the "irrational" to the "rational". No one has explained their basis, except necessity of protection of "insular" economic interests. Only the explanation of the dissent is possible: "The unpleasant truth is that it was particularly designed and dictated not by factual differences but by political expediency. Simplicity and

success at the polls overrode the considerations of fairness and justice. Thus Amendment No. 7 fails the test of rationality in its adoption."

Since the initial decision of the Trial Court, and prior to its final opinion, this Court decided *Gray vs. Sanders*, 83 S. Ct. 801. (March 18, 1963). That action involved validity, as applied to party primaries, of the Georgia County Unit system. However, in point of legal principle, it is difficult to apprehend the difference between application in such a case and at bar with the basic principles which seem of underlying importance.

The trial court found with respect to the county unit system that under Georgia statutes, "the vote of each citizen counts for less and less as the population of the county of his residence increases." It therefore held the acts void, holding that differentiation is irrational when there is a greater differentiation than obtains in the electoral college of the United States. This Court agreed, except that it considered even this allowance of differentiation too broad.

Similarly, in the Colorado Senate, the vote of each citizen counts for less and less as the county of his residence increases. Representation of that county is frozen forever. The smaller counties grow fewer and the importance of each vote rises as the larger counties grow larger and the importance of each voter falls. Control of the Senate remains, is intended to remain, and must remain in an ever smaller number of persons, who are vested with perpetual legislative veto.

At page 805 of its opinion, this Court once and we think finally stated the right of the voter to sue: "We also

agree that appellee, like any person whose right to vote is impaired . . . has standing to sue." The Court points out that the matter is not political, and is justiciable.

In the substantively critical holding, and at page 808 of its opinion, this Court states:

"The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that the discrimination was allowable . . . *How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural County?* ONCE THE GEOGRAPHICAL UNIT FOR WHICH A REPRESENTATIVE IS TO BE CHOSEN IS DESIGNATED, ALL WHO PARTICIPATE IN THE ELECTION ARE TO HAVE AN EQUAL VOTE — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions. [Emphasis supplied].

"The Court has consistently recognized that all qualified voters have a constitutionally protected right to 'cast their ballots and have them counted at Congressional elections.' . . . Every voter's vote is entitled to be counted once. It must be correctly counted and reported. As stated in *United States vs. Mosley*, 238 U.S. 383, 386, 35 S.Ct. 904, 905, 59 L.Ed. 1355, 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' It can be protected from the diluting effect of illegal ballots. . . . And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. . . . The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections . . . and, as previously noted, *there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State.* [Emphasis supplied].

"The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. Yet when Senators are chosen, the Seventeenth Amendment states the choice must be made 'by the people.' Minors, felons, and other classes may be excluded. . . . But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. As we stated in *Gomillion vs. Lightfoot*, supra, 364 U.S. p. 347, 81 S.Ct. p. 130: 'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial re-

view. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — ONE PERSON, ONE VOTE.” [Emphasis supplied].

We have no capacity to state these propositions more succinctly nor more cogently than this Court has above stated them. If the Constitution gives no indication that homesite affords permissible basis for distinguishing between voters; if equality of voting power is required; if the ruling conception is, as stated, One Person, One Vote; if representation is a representation of people in a State legislature, then, since our whole constitutional history is one of expansion and equalization of franchise and representation, a regressive and irrational measure such as challenged Amendment 7, which neither expands nor equalizes, but contracts representation and freezes and perpetuates disparity, cannot stand and must be void.

D. THERE IS NO HISTORIC PARALLEL BETWEEN COLORADO COUNTIES AND THE ORIGINAL STATES, NO BASIS FOR A FEDERAL PARALLEL, NO BASIS FOR A DIFFERENCE IN BASIS OF SELECTION BETWEEN THE HOUSE AND SENATE.

Reference is sometimes made to plans such as the plan set forth by Amendment 7 as a “Little federal” plan, attempting by this nomenclature to fortify the representational differentiation of house and senate. No basis for

such a difference exists. In Colorado, as we have shown above, no basis other than population ever existed, and the two houses of the assembly, from territorial period onward, differed from one another only in length of term and number of members, not in basis of selection, which was always territorial, predicated only on population.

Sometimes, also, appeal is made to an assumed analogy with the Electoral College.

Historically, of course, such analogies are not cogent. House and Senate of the United States are differently elected because the union was one of sovereign States, and the *State* is the basis of representation in the Senate, rather than its *population*. In no individual State is such an analogy applicable, for no state is a union of its counties.

Colorado particularly holds this analogy inapposite, since its counties are mere administrative arms of the state, changeable by it at will. In *Dixon vs. People*, 53 Colo. 527, 127 Pac. 930, the Colorado Supreme Court held that a county is an involuntary political and civil division of the territory of the state, created to aid in administration of governmental affairs, and is a quasi corporation for orderly government within the scope of its authority. It is merely a governmental agency or political subdivision of the State, exercising some functions of State government, as held in *Colorado Investment and Realty Co. vs. Riverview Drainage Dist.*, 83 Colo. 468, 266 Pac. 501, and in *Gamewell vs. Strumpler*, 84 Colo. 459, 271 Pac. 180.

Even our home-rule cities have no such independent governmental status. As stated in *Denver vs. Sweet*, 138

Colo. 41, 329 P.2d 441, discussing the powers of the City and County of Denver, the Colorado Court stated: "The United States Constitution provides for a national government with a federal system of *states*. All powers not expressly granted the federal government are reserved to the *states or to the people*. United States Constitution, Tenth Amendment. Colorado's Enabling Act, approved by the federal government when we acquired statehood, insured that our state will have a republican form of government. Enabling Act, Article 4. Clearly our federal system does not envisage as a part thereof city-states. It therefore follows that home rule cities can be only an arm or branch of the state with delegated power. That is the kind of power granted by Article XX." [Emphasis by the Court].

It is specifically clear from the Colorado Constitution that the General Assembly may change, alter the boundaries of, consolidate, or even abolish a county. Presumably, however, under Amendment 7, there could never be elimination of a Senatorial District, founded on the arbitrary adoption of an admittedly unconstitutional statute as a part of the Constitution. By Amendment 7, the Senatorial District, even though the County, which comprises it may be dissolved, is given a kind of apotheosis into perpetual glory.

In *Gray vs. Sanders*, referred to above, at page 897, this Court recognizes that the federal analogies are not apposite: "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution as the result of specific

historical concerns validated the collegiate principles despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a state in a state-wide election. *No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued. . . .*" [Emphasis supplied].

Similarly in Colorado no attempt to actually distribute the Senate on a geographical basis or an historical basis is made by Amendment 7. All that amendment does is take the *ad hoc* division, resulting in 1953 Statutes through the utterly chaotic process of legislative abuse described in the historic sections above, and perpetuate this void statute as a constitutional provision, after adding four seats, arbitrarily distributed. No specific accommodation to the claimed historical or geographical principle having been attempted to be made, and the Senate basis selected having admittedly no relation to history or to geography but only to the end result of legislative chaos and constitutional abuse, no validation of the distribution accomplished by Amendment 7 in the Senate can possibly be given by any hypothesized federal analogy.

E. AMENDMENT 7 IS IN NO MANNER PROTECTED BECAUSE IT WAS ADOPTED BY POPULAR VOTE.

In the motions to dismiss or affirm filed herein by the Appellees, as well as in the Court below, it was argued that some peculiar sanctity inheres in Amendment 7 because it was adopted by popular vote. It is even so argued in the Majority Opinion below.

We sincerely submit that such an argument cannot

have cogency. Constitutional right under the Fourteenth Amendment of any individual, in any state, is a right guaranteed by the Constitution of the United States and the institutions of the United States, and cannot be put aside by any state by popular vote, no matter how heavy. It is perfectly possible to assert that racial segregation would almost undoubtedly be approved by popular vote in many areas, were it submitted to that process, but its validity under the Fourteenth Amendment would be no whit strengthened by that approval. In like manner, no popular vote may take from any citizen his constitutional right of equal suffrage.

Colorado was required by the Enabling Act permitting it to enter the Union to adopt a Constitution specifically including the rights guaranteed by the Fourteenth Amendment. When any provision of any State Constitution, adopted by no matter how large a majority of the citizens of the State, trespasses upon an area protected by the Fourteenth Amendment, it is the provision of the State Constitution and not of the Amendment that is void.

The Colorado Supreme Court has repeatedly stricken provisions of State Law as violative of that Amendment to the United States Constitution. In *People vs. Western Union Telegraph Company*, 70 Colo. 90, 198 Pac. 146, and *People vs. Max*, 70 Colo. 100, 198 Pac. 150, it voided a Colorado Constitutional Amendment, popularly adopted, on that very ground. The Amendment rejected purported to prohibit trial judges from passing on constitutionality of challenged legislative enactments. The Colorado Supreme Court held not only that a judge might do so, but that he must, and any purported limitation placed by the State Constitution on his power so to do violated the Constitution of the United States:

"What the whole people of a state are powerless to do directly, either by statute or constitution, i.e., set aside the Constitution of the United States, they are equally powerless to do indirectly, either by a pretended authority granted to a municipality, or by a popular election, under the guise of a recall. [Emphasis supplied]. The original Constitution of Colorado was a solemn compact between the States and Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save in accordance with their contract. *They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States.* [Emphasis supplied]. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violations of the supreme compact and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union and no power in the people to command their courts to do so. That issue was finally settled at Appomattox."

Many other authorities to the point above made could be cited. However, when the supreme judicial authority in Colorado has pointed out this limitation upon the people of Colorado even in changing their own Constitution, when the problem here involved is simply whether a majority of the electors at a particular election can set aside the principle of equal protection of the laws, guaranteed by

the Fourteenth Amendment, as respects election of the State Legislature, it can scarcely be contended with conscience or with conviction that constitutionality of Amendment 7 is one whit affected by the fact or the extent of popular approval given its offending provisions.

Amendment Number 7 was cleverly merchandised. It was astutely compounded, in order to afford to many persons desiderata in no way connected with the basic constitutional problem of equality of vote. Nonetheless, the device was calculated to set at naught the equality of the franchise and to vest legislative control, or at the very least absolute legislative veto, in a minority of Colorado's people, and in its "insular" economic interests.

It was successfully merchandised, but then there is substantial and venerable historical parallel for the transference of birthrights in exchange for pottage. The promotion of the Amendment was expert, but its purpose was wrong; its effects, illegal; and no sanctity inheres in the majority vote of people to deprive other people of their vested constitutional right to vote and be represented as people, not as units in an "insular" interest. The fact and existence of the franchise, of its equality and vestiture in every citizen, is quite beyond the power of any majority of people in any state to change. An amendment based in such manner must be void.

F. THE SITUATION PRESENTED BY COLORADO APPORTIONMENT TYPIFIES THE EVILS NECESSARY TO BE REMEDIED THROUGH APPLICATION OF THE DOCTRINES OF VOTER EQUALITY HERETOFORE ANNOUNCED BY THIS COURT.

Other cases involving similar questions of state legislative apportionment have been heretofore argued before this Court, and the abuses inherent in distorted legislative systems have been carefully detailed to the Court. We do not wish unreasonably to repeat what has before been said so ably. Several basic considerations do occur as worthwhile again representing to the Court:

1. Discrimination clearly arises out of unequal legislative apportionment, in its nature gross and arbitrary. That discrimination is, however euphemistically worded, directed against suburban and urban centers and in favor of rural areas. There is nothing either inherently good in rural areas nor inherently evil in urban ones. Discrimination between them is unjustified. If permitted at all, time must serve to intensify its effects and its distortions. Population in the United States is and for half a century increasingly has been an urban and suburban function. Vote of the majority of the American people may not be diluted on the basis that that majority lives in and around the great cities. That distortion results in an arbitrary political patterning, a kind of gerrymander and crazy-quilt distribution of voting power, which the Majority Opinion can justify only as a protection of "insular interests", and which reality must characterize as a sanctioned vesting of minority economic interests with the prerogatives of majority popular control.

Representatives in a state legislative body represent people, not mountains, nor plains, nor roads, nor forests, nor cattle.

Colorado's people now live in the cities and their suburbs, as once they lived on its farms and near its mines. The fact that they no longer do so does not mean that in the legislature of the state we must represent "mining" or "farming" or "cattle raising" or "water" as suggested in the Majority Opinion. If these economic functions cease to be dominant in the legislature, it is because their importance in fact has ceased to be dominant insofar as concerns the majority of the people in the State of Colorado.

People and only people, wherever they live and whatever they do, must be represented, equally and with equal voice. If such representation result in some alteration in balance of economic controls, such is the necessary implicate of a vital, fluid, and changing economic world.

2. Inequality of voter representation not only deprives the individual voter of equal protection of the laws, but it resultantly impairs the basic legislative process, which in such circumstance becomes dependent upon "interests" rather than upon people, upon the lobby and its controls rather than upon popular mandate. At the very best, a situation such as fabricated in Colorado under Amendment 7 creates a situation of stalemate between the House, responsible directly to the people, and a Senate responsible to no one but a congeries of vested "insular interests."

Such a situation necessarily results in a splitting of aim, a bifurcation of policy, and even a negation of those

purposes to which the central aims of the nation are dedicated.

A further result must be to undermine the federal system of government. Such undermining is implicit in the notion that any majority of citizens in any state may by amendment of the state constitution negative the rights of others federally guaranteed. If the right of franchise can be so taken, then what others of the rights guaranteed by this nation to its citizens may not in isolated territories and states be denied?

3: Justifications for discrimination, such as area, history, the federal analogy, the availability of initiative, and even governmental boundary are without cogency. Colorado has never recognized any basis save population in apportionment. It has never differentiated between one house and the other in basis of selection, for both have been based upon population.

Minority interests, faced with the actuality of majority controls, have, however, discovered that a sudden divorce of the Senate from the population nexus will result in control of the Senate by those minority economic interests which desire to preserve control as against the urban and suburban population. It has been found that techniques of referendum salesmanship can persuade variant population groups, for a variety of reasons, to coalesce in support of a particular amendment. In this way, it is argued, the right to equal protection of the franchise of the individual, under the Fourteenth Amendment to the Constitution, can be locally subverted, a timeworn argument, outmoded, as stated by the Colorado Supreme Court, at Appomattox.

The argument forwarded is the very argument which this Court has rejected each time it has been advanced to block the progress of civil right. The basic civil rights of an individual in a constitutionally governed state are not dependent upon the suffrance or will of his neighbors, or even of a majority of them. Such individual rights are protected absolutely, by the Constitution, and no matter by what majority a man's neighbors may wish to strip him of his right, if it is in fact constitutionally founded as a right, it must be upheld.

The gravity of the questions here presented inheres in these propositions. If indeed equality of franchise be a right, then it is protected by the Fourteenth Amendment. If so guarded and guaranteed, no State constitutional provision, purporting to ignore, negative, or modify equality of franchise, particularly in so far-reaching a matter as the selection of the Senate of a State, can stand.

G. IT IS NOT STATISTICALLY OR PRACTICALLY DIFFICULT TO ESTABLISH RATIONAL DISTRICTS COMPATIBLE WITH THE GEOGRAPHY OF COLORADO AND WITH POPULATION, FOR SELECTION OF BOTH HOUSES OF THE GENERAL ASSEMBLY.

As mentioned in the prefatory portions of this Brief, the General Assembly in 1963, in order to implement Amendment 7, enacted House Bill 65. That bill had to do with the apportionment of the House of Representatives only, and was enacted under a requirement of Amendment 7 that the districts for the selection of the House of Representatives be distributed upon the basis of population as near as may be.

Apparently, it was perfectly possible to distribute the

house of representatives on a comparatively close adherence to parity of population, the most badly under-represented areas, which are still the urban ones, having about 81% of the vote to which on a strict population basis their population is entitled, and the most over-represented, which are still the rural and mining Counties, having not more than 133% of proper representation. These distributions are graphically illustrated in excerpts from the Amicus Curiae Brief submitted below by Mr. Philip J. Canosell, and on pages K18, K20, K21 (Map), and K22 of Appendix B to that Brief, being index values of votes of the members of the House of Representatives, based on that Bill, and included as Appendix B here.

Reference to the Map (K21) will readily demonstrate that it is quite as easy to group together counties for Senatorial purposes as it is for House purposes, and if it is possible to distribute members of the House on a nearly rational basis, then it is not impossible in like manner to distribute the Senate.

When these problems were presented to the Supreme Court of Colorado, long prior to House Bill 65, there were prepared tables showing a possible distribution of the House and Senate, grouping physically proximate counties together, in order to accord with the basic requirement that a representative represent, as nearly as might be, 26,984 persons, and that a senator represent, as nearly as might be, 50,111 persons. That data was also included in statistical submissions to the Court below.

This distribution was made purely on the basis of census statistics, readily available, and a map of the State of Colorado, also readily available. It is not suggested that it is the necessary or necessarily proper distribution,

but that it is not difficult, without offending either the principles of geography or population, to distribute both the House and Senate in Colorado without any serious aberrations from a true population standard. Allegation to the contrary simply cannot stand the light of the fact.

In the hope that it is useful, that possible distribution is reflected in the table constituting Appendix C attached hereto, and representing a possible distribution of both the Senate and the House of Representatives.

We have also provided to the Clerk, for distribution with the Briefs, and for use by the Court if it believes such use desirable, a copy of the applicable Colorado census document, which size does not permit to be included herein, but which contains the 1960 statistical data underlying the within action.

CONCLUSION

In conclusion, and for the reasons above set forth, the Appellants respectfully urge the reversal of the decision below reported as 219 F. Supp. 922, and urge the invalidation of Amendment 7, so-called, to the Constitution of the State of Colorado, as herein above set forth. Appellants further urge the Court to void, in accordance with the principles of the original Memorandum Opinion, 208 F. Supp. 471, the existing apportionment and apportionment statutes of the State of Colorado, as set forth in Appendix A to this Brief.

Appellants urge this Court to order apportionment of the State of Colorado, both the House and the Senate, in accordance with the principles of equality of vote, according to each of the senatorial and house districts votes as

near as may be in accordance with the population of those districts, and suggesting that some guidance in this direction is afforded by Exhibits B and C appended hereto.

Appellants specifically urge the Court in this regard to give specific instruction as to the mode of carrying out such apportionment and the time for the doing so, and respectfully submit that, while no legislature has yet been selected upon the invalid principles of Amendment 7, there will be selected at the November, 1964, elections, in the primaries in September, 1964, and in the convention processes in June and July, 1964, those persons who will constitute the coming legislature, so that it is in a time sense most urgent that orders be made in order that the General Assembly selected in 1964 and convening in January, 1965, will be lawfully and properly constituted.

In making these suggestions, Appellants are mindful of the heavy burden suggested to the Court, but do respectfully suggest that effective implementation of a decision in these matters does require specific direction with relation to the apportionment matter, particularly in the light of impending elections.

Most respectfully submitted,

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Appendix A

CHAPTER 63
GENERAL ASSEMBLY

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ARTICLE I

Membership

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63-1-1. *Members of general assembly.*—The senate of general assembly of the state of Colorado shall consist of thirty-five members, and the house of representatives thereof shall consist of sixty-five members. No senatorial or representative district shall embrace the same territory within any other senatorial or representative district, respectively.

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63-1-2. *Ratios fixed and established.*—The following ratios are hereby fixed and established for the apportionment of senators and representatives of the general assembly.

(1) The ratio for the apportionment of senators shall be:

(a) One senator for each senatorial district for the first nineteen thousand of population therein;

(b) One additional senator for each senatorial district for each additional fifty thousand of population therein or fraction over forty-eight thousand.

(2) The ratio for the apportionment of representatives shall be:

(a) One representative for each representative district for the first eight thousand of population therein;

(b) One additional representative for each additional twenty-five thousand five hundred of population therein, or fraction over twenty-two thousand four hundred.

Source: L. 53, p. 120, § 2.

63-1-3. *Senatorial districts.*—The state of Colorado shall be divided into twenty-five senatorial districts, numbered and entitled to the number of senators, as follows:

The city and county of Denver shall constitute the first senatorial district and be entitled to eight senators.

The county of Pueblo shall constitute the second senatorial district and be entitled to two senators.

The county of El Paso shall constitute the third senatorial district and be entitled to two senators.

The county of Las Animas shall constitute the fourth senatorial district and be entitled to one senator.

The county of Boulder shall constitute the fifth senatorial district and be entitled to one senator.

The counties of Chaffee, Park, Gilpin, Clear Creek, Douglas and Teller shall constitute the sixth senatorial district and be entitled to one senator.

The county of Weld shall constitute the seventh senatorial district and be entitled to two senators.

The county of Jefferson shall constitute the eighth senatorial district and be entitled to one senator.

The counties of Fremont and Custer shall constitute the ninth senatorial district and be entitled to one senator.

The county of Larimer shall constitute the tenth senatorial district and be entitled to one senator.

The counties of Delta, Gunnison and Hinsdale shall constitute the eleventh senatorial district and be entitled to one senator.

The counties of Logan, Sedgwick and Phillips shall constitute the twelfth senatorial district and be entitled to one senator.

The counties of Rio Blanco, Moffat, Routt, Jackson and Grand shall constitute the thirteenth senatorial district and be entitled to one senator.

The counties of Huerfano, Costilla and Alamosa shall constitute the fourteenth senatorial district and be entitled to one senator.

The counties of Saguache, Mineral, Rio Grande and Conejos shall constitute the fifteenth senatorial district and be entitled to one senator.

The county of Mesa shall constitute the sixteenth senatorial district and be entitled to one senator.

The counties of Montrose, Ouray, San Miguel and Dolores shall constitute the seventeenth senatorial district and be entitled to one senator.

The counties of Kit Carson, Cheyenne, Lincoln and Kiowa shall constitute the eighteenth senatorial district and be entitled to one senator.

The counties of San Juan, Montezuma, La Plata and Archuleta shall constitute the nineteenth senatorial district and be entitled to one senator.

The counties of Yuma, Washington and Morgan shall constitute the twentieth senatorial district and be entitled to one senator.

The counties of Garfield, Summit, Eagle, Lake and Pitkin shall constitute the twenty-first senatorial district and be entitled to one senator.

The counties of Arapahoe and Elbert shall constitute the twenty-second senatorial district and be entitled to one senator.

The counties of Otero and Crowley shall constitute the twenty-third senatorial district and be entitled to one senator.

The county of Adams shall constitute the twenty-fourth senatorial district and be entitled to one senator.

The counties of Bent, Prowers and Baca shall constitute the twenty-fifth senatorial district and be entitled to one senator.

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63-1-4. *Election of senators.*—Four senators shall be elected from the first senatorial district and one each from the second, third, sixth, seventh, tenth, twelfth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, twentieth and twenty-fifth districts at the general election held in November, 1954, and every four years thereafter.

Four senators shall be elected from the first senatorial district and one each from the second, third, fourth, fifth, seventh, eighth, ninth, eleventh, thirteenth, nineteenth, twenty-first, twenty-second, twenty-third, and twenty-fourth districts at the general election held in November, 1956, and every four years thereafter.

63-1-5. *Senators keep office—vacancies.*—Nothing in this article shall be construed to cause the removal of any senator from his office for the term for which he has been elected, but all such senators shall serve the term for which they were elected; provided, that in case of a vacancy caused by the death, resignation or otherwise of any such senator or senators, the vacancy shall be filled as provided by law from the new district as provided for in this article.

Source: L. 53, p. 122, § 5.

63-1-6. *Members of house of representatives.*—The members of the house of representatives shall be divided among the several counties of the state as follows:

The city and county of Denver shall have seventeen.

The county of Pueblo shall have four.

The county of Weld shall have three.

The county of El Paso shall have three.

The county of Las Animas shall have one.

The county of Boulder shall have two.

The county of Larimer shall have two.

The county of Arapahoe shall have two.

The counties of Crowley and Otero shall have two.

The county of Mesa shall have two.

The county of Delta shall have one.

The county of Huerfano shall have one.

The county of Jefferson shall have two.

The county of Logan shall have one.

The county of Morgan shall have one.

The county of Adams shall have two.

The county of Yuma shall have one.

The counties of Washington and Kit Carson shall have one.

The counties of Prowers and Baca shall have one.

The counties of Routt, Moffat, Grand and Jackson shall have one.

The counties of Montrose and Ouray shall have one.

The counties of San Miguel, Dolores and Montezuma shall have one.

The counties of La Plata and San Juan shall have one.

The counties of Hinsdale, Gunnison and Saguache shall have one.

The counties of Rio Grande and Mineral shall have one.

The counties of Conejos and Archuleta shall have one.

The counties of Alamosa and Costilla shall have one.

The counties of Fremont and Custer shall have one.

The counties of Park, Teller, Douglas and Elbert shall have one.

The counties of Lake and Chaffee shall have one.

The counties of Eagle, Pitkin, Summit, Clear Creek and Gilpin shall have one.

The counties of Rio Blanco and Garfield shall have one.

The counties of Sedgwick and Phillips shall have one.

The counties of Cheyenne and Lincoln shall have one.

The counties of Kiowa and Bent shall have one.

63-1-7. *Representatives keep office — biennial elections.*—Nothing in this article shall be construed to cause the removal of any representative from his present term of office, and representatives shall be elected under the provisions of this article beginning with the general election held in November, 1954, and every two years thereafter.

.

63-1-8. *New counties.*—In the event that any new county is created at any time after the passage of this article, and the legislature has not provided for the attaching of said new county to a specifically mentioned district, then such new county shall be deemed to be in the senatorial or representative district that said territory was in prior to its creation.

Appendix B (K-18)

TABLE II-B

INDEX VALUES OF VOTES OF MEMBERS OF THE COLORADO STATE HOUSE OF REPRESENTATIVES AS PERCENTAGES OF STATE- WIDE AVERAGE (100%), BY COUNTIES, 1960 CENSUS

BASED ON PROVISIONS OF CONSTITUTIONAL
AMENDMENT NO. 7, PASSED BY COLORADO ELEC-
TORATE ON NOVEMBER 6, 1962, AND HOUSE BILL
NO. 65, ENACTED BY THE FORTY-FOURTH COLO-
RADO GENERAL ASSEMBLY, 1963

Colorado Population, 1960: 1,753,947

Number of Representatives: 65

Average Population Represented, State-wide: 26,984

Average Population, 26,984: 100%, base

*Rank of Percentage Values of Votes in House of Repre-
sentatives, By Counties, 1960 Census*

*Based on Provisions of Amendment No. 7 and
House Bill No. 65*

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Dis- trict	Counties in Representative Districts	County Popu- lation	Number of Repre- sentatives	Average Popu- lation Repre- sented	Average as Percent of State (100%) Average
51	Logan	20,000	1	20,302	133
65	Cheyenne	2,789	1	21,189	127
	Elbert	3,708			
	Kiowa	2,425			
	Kit Carson	6,957			
	Lincoln	5,310			

APPENDIX B (K-18) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
District	Counties in Representative Districts	County Popu- lation	Number of Repre- sentatives	Average Popu- lation Represented	County Average as Percent of State (100%) Average
55	Morgan	21,192	1	21,192	127
57	Delta	15,602	1	21,287	127
	Gunnison	5,477			
	Hinsdale	208			
52	Custer	1,305	1	21,501	126
	Fremont	20,196			
63	Alamosa	10,000	1	22,340	121
	Huerfano	208			
	Saguache	4,473			
62	Archuleta	2,629	1	22,641	119
	Conejos	8,428			
	Mineral	424			
	Rio Grande	11,160			
61	Clear Creek	2,793	1	23,827	113
	Gilpin	685			
	Grand	3,557			
	Jackson	1,758			
	Moffat	7,061			
	Routt	5,900			
	Summit	2,073			
43-45	Weld	72,344	3	24,115	112
54	Costilla	4,219	1	24,202	111
	Las Animas	19,983			

APPENDIX B (K-18) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Dis- trict	Counties in Representative Districts	County Popu- lation	Number of Repre- sentatives	Average Popu- lation Repre- sented	County Average as Percent of State (100%) Average
56	Phillips Sedgwick Washington Yuma	4,440 5,353 6,625 8,912	1	24,219	111
60	Eagle Garfield Pitkin Rio Blanco	4,677 12,017 2,381 5,150	1	24,225	111
58	Chaffee Douglas Lake Park Teller	8,298 4,816 7,101 1,822 2,495	1	24,532	110
40-42	Boulder	74,254	3	24,751	109
48-49	Mesa	50,715	2	25,358	106
64	Dolores Montrose Ouray San Juan San Miguel	2,196 18,286 1,601 849 2,944	1	25,876	104
36-39	Arapahoe	113,426	4	26,370	102
46-47	Larimer	53,343	2	26,672	101
50	Baca Bent Prowers	6,310 7,419 13,296	1	27,025	99

APPENDIX B (K-18) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Dis- trict	Counties in Representative Districts	County Popu- lation	Number of Repre- sentatives	Average Popu- lation Repre- sented	County Average as Percent of State (100%) Average
1-18	Denver	493,887	18	27,473	98
53	Crowley	3,978	1	28,106	96
	Otero	24,128			
19-23	El Paso	143,742	5	28,748	94
32-35	Pueblo	118,707	4	29,677	91
28-31	Adams	120,296	4	30,074	90
24-27	Jefferson	127,520	4	31,818	85
59	La Plata	19,225	1	33,249	81
	Montezuma	14,024			

Appendix B (K-20)

TABLE II-E

**INDEX VALUES OF VOTES OF MEMBERS OF
THE COLORADO STATE HOUSE OF REPRESENTATIVES AS PERCENTAGES OF STATE-
WIDE AVERAGE (100%), BY DISTRICTS,
1960 CENSUS**

**BASED ON PROVISIONS OF HOUSE BILL NO. 65,
ENACTED BY THE FORTY-FOURTH COLORADO
GENERAL ASSEMBLY, 1963. SIGNED BY GOVERNOR
JOHN A. LOVE ON FEBRUARY 11, 1963**

Colorado Population, 1960: 1,753,947

Number of Representative Districts: 65

Number of Representatives: 65

Average Population Represented, State-Wide: 26,984

Average Population, 26,984: 100%, base

Column 1	Column 2	Column 3	Column 4	Column 5
District Number	County or Counties in District	District Population*	Number of Representatives	District Population Average as Percent of State (100%) Average
1	Denver	28,348**	1	95
2	Denver	28,857	1	94
3	Denver	27,956	1	97
4	Denver	26,072	1	103
5	Denver	23,587**	1	114
6	Denver	27,331	1	99
7	Denver	28,249	1	96
8	Denver	32,417**	1	83
9	Denver	29,704	1	91

*Source: Colorado State Legislative Council, Jan. 18, and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

APPENDIX B (K-20) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5
District Number	County or Counties in District	District Population*	Number of Representatives	District Population Average as Percent of State (100%) Average
10	Denver	29,511	1	91
11	Denver	26,251	1	103
12	Denver	26,871	1	100
13	Denver	26,493**	1	102
14	Denver	24,478**	1	110
15	Denver	29,437	1	92
16	Denver	26,476	1	102
17	Denver	26,679	1	101
18	Denver	25,790	1	105
19	El Paso	28,595	1	94
20	El Paso	33,328	1	81
21	El Paso	27,790	1	97
22	El Paso	24,719	1	109
23	El Paso	29,310	1	92
24	Jefferson	30,964	1	87
25	Jefferson	33,653**	1	80
26	Jefferson	35,123	1	77
27	Jefferson	27,534**	1	98
28	Adams	30,479	1	89
29	Adams	29,259	1	92
30	Adams	27,446	1	98
31	Adams	33,112	1	81

*Source: Colorado State Legislative Council, Jan. 18, and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

APPENDIX B (K-20) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5
District Number	County or Counties in District	District Population*	Number of Representatives	District Population Average as Percent of State (100%) Average
32	Pueblo	25,435	1	106
33	Pueblo	25,540	1	106
34	Pueblo	32,714	1	82
35	Pueblo	35,018	1	77
36	Arapahoe	32,554**	1	83
37	Arapahoe	29,030**	1	93
38	Arapahoe	22,081**	1	122
39	Arapahoe	21,813**	1	124
40	Boulder	27,222	1	99
41	Boulder	24,381	1	111
42	Boulder	22,651	1	119
43	Weld	24,303	1	111
44	Weld	24,014	1	112
45	Weld	24,027	1	112
46	Larimer	28,162	1	96
47	Larimer	25,181	1	107
48	Mesa	26,941	1	100
49	Mesa	23,774	1	114
50	Bent Prowers Baca	27,025	1	99
51	Logan	20,302	1	133

*Source: Colorado State Legislative Council, Jan. 18, and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

APPENDIX B (K-20) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5
District Number	County or Counties in District	District Population *	Number of Representatives	District Population Average as Percent of State (100%) Average
52	Fremont Custer	21,501	1	126
53	Otero Crowley	28,106	1	96
54	Las Animas Costilla	24,202	1	111
55	Morgan	21,192	1	127
56	Yuma Phillips Sedgwick Washington	24,219	1	111
57	Delta Gunnison Hinsdale	21,287	1	127
58	Park Teller Douglas Chaffee Lake	24,532	1	110
59	La Plata Montezuma	33,249	1	81

*Source: Colorado State Legislative Council, Jan. 18, and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

APPENDIX B (K-20) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5
District Number	County or Counties in District	District Population*	Number of Representatives	District Population Average as Percent of State* (100%) Average
60	Garfield Eagle Pitkin Rio Blanco	24,225	1	111
61	Summit Moffat Routt Jackson Grand Clear Creek Gilpin	23,827	1	113
62	Conejos Rio Grande Mineral Archuleta	22,641	1	119
63	Alamosa Huerfano Saguache	22,340	1	121
64	Montrose Ouray San Miguel Dolores San Juan	25,876	1	104

*Source: Colorado State Legislative Council, Jan. 18, and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

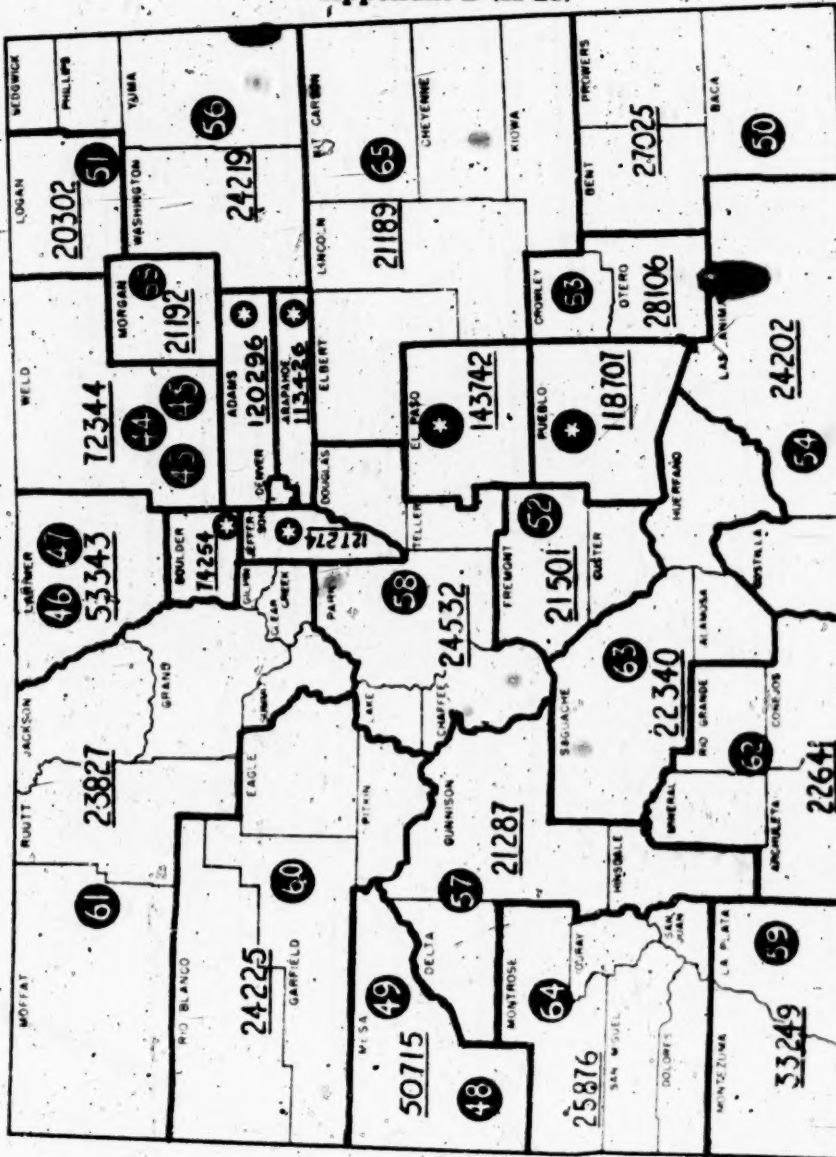
APPENDIX B (K-20) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5
District Number	County or Counties in District	District Population*	Number of Representatives	District Population Average as Percent of State (100%) Average
65	Lincoln Kit Carson Elbert Cheyenne Kiowa	21,189	1	127

*Source: Colorado State Legislative Council, Jan. 18, and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

Appendix B (K-21)



This map shows how Colorado's House of Representative districts will be divided up under the new apportionment, passed by the Legislature and approved by Governor Love.

Appendix B (K-22)

TABLE II-F

RANK OF INDEX VALUES OF VOTES OF MEMBERS OF THE COLORADO STATE HOUSE OF REPRESENTATIVES AS PERCENTAGES OF STATE-WIDE AVERAGE (100%), BY REPRESENTATIVE DISTRICTS, 1960 CENSUS

BASED ON PROVISIONS OF HOUSE BILL NO. 65,
ENACTED BY THE FORTY-FOURTH COLORADO
GENERAL ASSEMBLY, 1963. SIGNED BY GOVER-
NOR JOHN A. LOVE ON FEBRUARY 11, 1963*

Colorado Population, 1960: 1,753,947

Number of Representative Districts: 65

Number of Representatives: 65, one for each district

Average Population Represented, State-Wide: 26,984

* Average Population, 26,984: 100%, base

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
District No.	County or Counties in District	District Population*	District Population Average as Percent of State (100%) Average	Ratio of Highest Percentage District to All other Districts	Ratio of All Districts to Lowest Percentage District
51	Logan	20,302	133	1.0 - 1	1.7 - 1
65	Cheyenne Elbert Kiowa Kit Carson Lincoln	21,189	127	1.0 - 1	1.6 - 1
55	Morgan	21,192	127	1.0 - 1	1.6 - 1

*Source: Colorado State Legislative Council, Jan. 18 and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

APPENDIX B (K-22) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
District No.	County or Counties in District	District Population*	District Population Average as Percent of State (100%) Average	Ratio of Highest Percentage District to All other Districts	Ratio of All Districts, to Lowest Percentage District
57	Delta Gunnison Hinsdale	21,287	127	1.0 - 1	1.6 - 1
52	Custer Fremont	21,501	126	1.1 - 1	1.6 - 1
39	Arapahoe	21,813**	124	1.1 - 1	1.6 - 1
38	Arapahoe	22,081**	122	1.1 - 1	1.6 - 1
63	Alamosa Huerfano Saguache	22,340	121	1.1 - 1	1.6 - 1
62	Archuleta Conejos Mineral Rio Grande	22,641	119	1.1 - 1	1.5 - 1
42	Boulder	22,651	119	1.1 - 1	1.5 - 1
5	Denver	23,587**	114	1.2 - 1	1.5 - 1
49	Mesa	23,774	114	1.2 - 1	1.5 - 1

*Source: Colorado State Legislative Council, Jan. 18 and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

APPENDIX B (K-22) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
District No.	County or Counties in District	District Population*	District Population Average as Percent of State (100%) Average	Ratio of Highest Percentage District to All other Districts	Ratio of All Districts to Lowest Percentage District
61	Clear Creek Gilpin Grand Jackson Moffat Routt Summit	23,827	113	1.2 - 1	1.5 - 1
44	Weld	24,014	112	1.2 - 1	1.5 - 1
45	Weld	24,027	112	1.2 - 1	1.5 - 1
54	Costilla Las Animas	24,202	111	1.2 - 1	1.4 - 1
56	Phillips Sedgwick Washington Yuma	24,219	111	1.2 - 1	1.4 - 1
60	Eagle Garfield Pitkin Rio Blanco	24,225	111	1.2 - 1	1.4 - 1
43	Weld	24,303	111	1.2 - 1	1.4 - 1
41	Boulder	24,381	111	1.2 - 1	1.4 - 1
14	Denver	24,478**	110	1.2 - 1	1.4 - 1

*Source: Colorado State Legislative Council, Jan. 18 and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver

APPENDIX B (K-22) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
District No.	County or Counties in District	District Population*	District Population Average as Percent of State (100%) Average	Ratio of Highest Percentage District to All other Districts	Ratio of All Districts to Lowest Percentage District
58	Chaffee Douglas Lake Park Teller	24,532	110	1.2 - 1	1.4 - 1
22	El Paso	24,719	109	1.2 - 1	1.4 - 1
47	Larimer	25,181	107	1.2 - 1	1.4 - 1
32	Pueblo	25,435	106	1.3 - 1	1.4 - 1
33	Pueblo	25,540	106	1.3 - 1	1.4 - 1
18	Denver	25,790	105	1.3 - 1	1.4 - 1
64	Dolores Ouray Montrose San Juan San Miguel	25,876	104	1.3 - 1	1.4 - 1
4	Denver	26,072	103	1.3 - 1	1.3 - 1
11	Denver	26,251	103	1.3 - 1	1.3 - 1
16	Denver	26,476	102	1.3 - 1	1.3 - 1
13	Denver	26,493**	102	1.3 - 1	1.3 - 1
17	Denver	26,679	101	1.3 - 1	1.3 - 1

*Source: Colorado State Legislative Council, Jan. 18 and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

APPENDIX B (K-22) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
District No.	County or Counties in District	District Population*	District Population Average as Percent of State (100%) Average	Ratio of Highest Percentage District to All other Districts	Ratio of All Districts to Lowest Percentage District
12	Denver	26,871	100	1.3 - 1	1.3 - 1
48	Mesa	26,941	100	1.3 - 1	1.3 - 1
COLORADO, 100% base					
50	Baca Beat Prowers	27,025	99	1.3 - 1	1.3 - 1
40	Boulder	27,222	99	1.3 - 1	1.3 - 1
6	Denver	27,331	99	1.3 - 1	1.3 - 1
30	Adams	27,446	98	1.4 - 1	1.3 - 1
27	Jefferson	27,534**	98	1.4 - 1	1.3 - 1
21	El Paso	27,790	97	1.4 - 1	1.3 - 1
3	Denver	27,956	97	1.4 - 1	1.3 - 1
53	Crowley Otero	28,106	96	1.4 - 1	1.2 - 1
46	Larimer	28,162	96	1.4 - 1	1.2 - 1
7	Denver	28,249	96	1.4 - 1	1.2 - 1
1	Denver	28,348**	95	1.4 - 1	1.2 - 1
19	El Paso	28,595	94	1.4 - 1	1.2 - 1
2	Denver	28,857	94	1.4 - 1	1.2 - 1

*Source: Colorado State Legislative Council, Jan. 18 and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

APPENDIX B (K-22) (Continued)

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
District No.	County or Counties in District	District Population*	District Population Average as Percent of State (100%) Average	Ratio of Highest Percentage District to All other Districts	Ratio of All Districts to Lowest Percentage District
37	Arapahoe	29,030**	93	1.4 - 1	1.2 - 1
29	Adams	29,259	92	1.5 - 1	1.2 - 1
23	El Paso	29,310	92	1.5 - 1	1.2 - 1
15	Denver	29,437	92	1.5 - 1	1.2 - 1
10	Denver	29,511	91	1.5 - 1	1.2 - 1
9	Denver	29,704	91	1.5 - 1	1.2 - 1
28	Adams	30,479	89	1.5 - 1	1.2 - 1
24	Jefferson	30,964	87	1.5 - 1	1.1 - 1
8	Denver	32,417**	83	1.6 - 1	1.1 - 1
36	Arapahoe	32,554**	83	1.6 - 1	1.1 - 1
34	Pueblo	32,714	82	1.6 - 1	1.1 - 1
31	Adams	33,112	81	1.6 - 1	1.1 - 1
52	La Plata Montezuma	33,249	81	1.6 - 1	1.1 - 1
20	El Paso	33,328	81	1.6 - 1	1.1 - 1
25	Jefferson	33,653**	80	1.7 - 1	1.0 - 1
35	Pueblo	35,018	77	1.7 - 1	1.0 - 1
26	Jefferson	35,123	77	1.7 - 1	1.0 - 1

*Source: Colorado State Legislative Council, Jan. 18 and Feb. 8, 1963.

**These districts show plus or minus effects of annexation to Denver.

Appendix C

POSSIBLE DISTRIBUTION

1. Senate Districts

Dist.	Counties Included	REPRESENTATION:			POPULATION:	
		Now	Pop. Basis	Suggested	Total Suggested Dist.	Total per Senator
1	City and County of Denver	8	9.85	9	493,887	54,765
2	Pueblo	2	2.40	3	118,707	
23	Crowley	) 1	.56		28,106	
	Otero	) 3	2.96	3	146,813	48,937
3	El Paso	2	2.86	3	143,742	47,914
4	Las Animas	1	0.40)	1	19,983	
14	Huerfano	) 1	0.44)		22,086	
	Costilla	) 2	0.84	1	42,069	42,069
	Alamosa)				

Note: It is clear that even as combined, these districts would be over-represented somewhat, but it is almost impossible to make all districts precisely equal when working with the requirement imposed by counties as units and the existing district scheme.

5	Boulder	1	1.50	2	74,254	37,127
---	---------	---	------	---	--------	--------

Note: There is no other existing district with which it appears geographically possible to combine Boulder. It is precisely on the line as regards present Senatorial representation between a proper representation of 1 and 2. It is included in Census as part of the urban area comprising Denver, Adams, Jef-

APPENDIX C (Continued)

Dist.	Counties Included	REPRESENTATION:			POPULATION:	
		Now	Pop. Basis	Sug- gested	Total Suggested Dist.	Total per Senator
<p>person, Arapahoe, and Boulder Counties. Thus some judgment is to be exercised as to whether one more Senator go to Denver, and no increase to Boulder, whose population increased 53.7% while that of Denver rose only 18.8%, or to Boulder. Probably Boulder population will continue to increase faster than Denver, resulting in the suggested arrangement perhaps avoiding future-occurring distortion.</p>						
6	Chaffee)					
)					
	Park)					
)					
	Gilpin)	1	0.37)		18,414	
))			
	Clear Creek))			
))			
	Douglas))			
	)		)	1		
))			
9	Fremont)					
	)	1	0.43)		21,501	
)	—	—	—	—	
	Custer)					
	)	2	0.80	1	39,915	39,915
Note: See note in 4 and 14 above.						
7	Weld)	2	1.44)		72,344	
))			
	)		)	2		
12	Logan))			
))			
	Sedgwick)	1	0.58)		28,984	
)	—	—	—	—	
	Phillips)	3	2.02	2	101,328	50,664

APPENDIX C (Continued)

Dist.	Counties Included	REPRESENTATION:			POPULATION:	
		Now	Pop. Basis	Suggested	Total Suggested Dist.	Total per Senator
8	Jefferson	1	2.55	3	127,520	42,506
Note: In view of the 129% increase in population in this area between 1950 and 1960, and the basic population trends which indicate continued increase of population in the area, resolution of the fractional factor in favor of an additional member for this County would appear justified.						
10	Larimer	1	1.10	1	53,343	53,343
11	Delta)				
	Gunnison	) 1	0.42)		21,287	
	Hinsdale))			
		)	)	1		
17	Montrose))			
	Ourray))			
	San Miguel	) 1	0.52)		25,027	
	Dolores	) 2	0.94	1	46,314	46,314

APPENDIX C (Continued)

Dist.	Counties Included	REPRESENTATION		POPULATION		Total per Senator
		Now	Pop. Basis	Sug- gested	Total Suggested Dist.	
13	Rio Blanco	1	0.47)	1	23,426	
	Moffat					
	Routt					
	Jackson					
	Grand					
21	Garfield	1	0.56)	1	28,249	
	Summit					
	Eagle					
	Lake					
	Pitkin					
15	Saguache	1	0.44)	1	24,485	
	Mineral					
	Rio Grande					
	Conejos					
19	San Juan	1	0.73)	1	36,727	
	Montezuma					
	La Plata					
	Archuleta					

APPENDIX C (Continued)

Dist.	Counties Included	REPRESENTATION:		POPULATION:		Total per Senator
		Now	Pop. Basis	Sug- gested	Total Suggested Dist.	
16	Mesa	1	1.0	1	50,715	50,715
18	Kit Carson	1	0.35)	1	17,481	
	Cheyenne					
	Lincoln					
	Kiowa					
	Bent					
25	Prowers	1	0.54)	1	27,025	44,506
	Baca	2	0.89		44,506	
20	Yuma	1	0.73	1	36,729	36,729
	Washington					
	Morgan					

Note: This district is over-represented even as proposed, but geographically there appears to be no reasonable combination, and it is a group of persons sufficiently numerous to require specific representation. The geographically difficult position of this group of counties makes a somewhat greater representation than population justifies an inevitability.

22	Arapahoe	1	2.34	2	117,134	58,567
	Elbert					

Note: The district is obviously slightly under-represented, inevitable in view of the fractional representative problem. However, when combined with Jefferson at 3 Senators, as suggested in 8 above, and Adams, with 2 Senators, as suggested in 24 below, this gives the Tri-Counties 7 total representatives for 361,242 population, or 51,606 per Senator, which is almost perfect representation from a population point of view.

APPENDIX C (Continued)

Dist.	Counties Included	REPRESENTATION:		POPULATION:		
		Now	Pop. Basis	Sug- gested	Total Suggested Dist.	Total per Senator
24	Adams	1	2.41	2	120,296	60,148

Note: See note to 22 (Arapahoe & Elbert) above.

It is obvious that the above device—which is shown merely as a suggestion that it is quite possible, without difficulty, to make a judicial distribution of representation which will be essentially just,—achieves a substantially proper representation. Denver and the Tri-Counties have 49% of population. Under this device, they have 16 out of 35 representatives, being 45.7% of the Senate, a substantial improvement over the 31.4% now allowed, and almost as close as practicable to mathematical exactness. Similarly, Denver, the Tri-Counties, Pueblo, El Paso, and Boulder, contain 63% of the State's population. Under the above scheme, these counties have 24 out of 35 members of the Senate, or 68.5%, again near mathematical exactness, and probably almost exact in view of the fact that these are the areas in which substantial growth is continuing to take place.

Rather a similar method of distribution can be suggested for the House of Representatives:

APPENDIX C (Continued)

2. House Districts

Dist.	Counties Included	REPRESENTATION:		POPULATION:		Total per Rep.
		Now	Pop. Basis	Sug- gested	Total Suggested Dist.	
1	City and County of Denver	17	18.25	18	493,887	27,438
2	Pueblo	4	4.45)	6	118,707	
	Crowley))			
	Otero)	2	1.06)		28,106	
		6	5.51	6	146,813	24,468
3	Weld	3	2.68		72,344	
	Logan	1	1.08		28,984	
	Sedgwick)			4		
	Phillips)	1				
		5	3.74	4	101,328	25,332
4	El Paso	3	5.3	5	143,742	28,748
5	Las Animas	1	0.74		19,983	
	Huerfano	1	0.81		22,086	
	Costilla)			2		
	Alamosa)	1	1			
		3	1.55	2	42,069	21,034

Note: Even combining these districts, they are substantially over-represented, but again the limits of units of representation make impossible a complete situation of equality.

APPENDIX C (Continued)

Dist.	Counties Included	REPRESENTATION:			POPULATION:	
		Now	Pop. Basis	Sug- gested	Total Suggested Dist.	Total per Rep.
<p>SPECIAL NOTE: Huerfano County, above, now allowed one representative, is the most violently over-represented area in the State, having only a population of 7,867 persons, who have a representation identical to that now allowed 63,260 persons in the County of Jefferson. There are too few persons in the County even to justify a representative under the grossly improper precept statute, which requires an 8,000 population minimum. This 9 to 1 distortion is constitutionally insupportable.</p>						
6	Boulder	2	2.70	3	74,254	24,418
7	Larimer	2	1.96	2	53,343	26,671
8	Arapahoe	2	4.20		113,426	
	Elbert	Frac- tional	.32	5.0	3,708	
	Douglas				4,816	
		2+	4.52	5.0	121,950	24,390
9	Mesa	2	1.88	2	50,715	25,357
10	Delta	1	0.58	1	15,602	
	Gunnison)				
		)	1	0.36	5,685	
	Hinsdale)				
	Saguache				4,473	
		2	0.94	1	25,760	25,760
11	Jefferson	2	4.72		127,520	
	Park	Frac- tional	.16	5	4,317	
	Teller					
		2+	4.88	5	131,837	26,367

APPENDIX C (Continued)

Dist.	Counties Included	REPRESENTATION:		POPULATION:		Total per Rep.
		Now	Pop. Basis	Sug- gested	Total Suggested Dist.	
12	Morgan	1	0.78		21,192	
	Washington	1	0.505	2	13,582	
	Kit Carson	1	0.33		8,912	
	Yuma	3	1.615	2	43,686	21,848
13	Adams	2	4.55	4	120,296	30,074
14	Prowers	1	0.72		19,606	
	Baca	1	0.30	1	8,099	
	Cheyenne	1	0.366		9,844	
	Lincoln					
	Bent					
	Kiowa	3	1.356	1	36,549	36,549
<p align="center">Note: Again this is a distortion made necessary by the problem of counties as units and the indivisibility of a representative.</p>						
15	Routt	1	0.65		18,276	
	Moffat					
	Grand					
	Jackson					
	Rio Blanco	1	0.635	2	17,167	
	Garfield	1	0.465		12,609	
	Summit					
	Eagle					
	Pitkin					
	Clear Creek					
	Gilpin	3	1.750	2	48,052	24,026

APPENDIX C (Continued)

Dist.	Counties Included	REPRESENTATION:		POPULATION:		Total per Rep.
		Now	Pop. Basis	Sug- gested	Total Suggested Dist.	
16	Montrose	1	0.74		19,887	
	Ouray					
	San Miguel	Frac- tional	0.185	1	5,140	
	Dolores					
		1	0.925	1	25,027	25,027
17	San Juan	1	0.755		20,074	
	La Plata					
	Rio ^o Grande	1	0.430		11,585	
	Mineral			2		
	Conejos	1	0.410		11,057	
	Archuleta					
	Montezuma	Frac- tional	0.520		14,024	
		3	2.110	2	58,720	29,360

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IN THE
Supreme Court of the United States

No. 508 October Term 1963

ANDRES LUCAS and ARCHIE L. LISCO, individually and as
citizens of the State of Colorado, taxpayers and electors
therein, for themselves and for all other persons similarly
situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF
COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF
COLORADO, HOMER BEDFORD AS TREASURER OF THE STATE
OF COLORADO, AND BYRON ANDERSON AS SECRETARY OF
STATE OF THE STATE OF COLORADO, EDWIN C. JOHNSON,
JOHN C. VIVIAN, JOSEPH E. LITTLE, WARWICK DOWNING
and WILBUR M. ALTER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF APPELLEES

Edwin C. Johnson, John C. Vivian, Joseph F. Little,
Warwick Downing and Wilbur M. Alter

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IN THE
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ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens of the State of Colorado, taxpayers and electors therein, for themselves and for all other persons similarly situated,

Appellants,

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THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLORADO, HOMER BEDFORD AS TREASURER OF THE STATE OF COLORADO, AND BYRON ANDERSON AS SECRETARY OF STATE OF THE STATE OF COLORADO, EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING and WILBUR M. ALTER,

Appellees.

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BRIEF OF APPELLEES

Edwin C. Johnson, John C. Vivian, Joseph F. Little,
Warwick Downing and Wilbur M. Alter

JURISDICTION

This is an appeal from a three judge district court. Jurisdiction is based upon 28 U.S.C. §1253.

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

1. *Federal Constitution.* Constitution of the United

States, Amendment XIV, Section 1, provides in material part:

"... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

2. *Colorado Constitution.* Article V, Sections 45, 46 and 47 of the Constitution of the State of Colorado, as amended in the 1962 general elections by Initiated Amendment Number 7, the text of which is set forth in the Appellees' Appentix at page 257.¹ Amendment 7 refers to Section 61-1-3 Colorado Revised Statutes 1953, the text of which is contained in Appendix A to Appellants' brief. Along with Article V, Sections 45, 46 and 47, consideration must be given to Article V, Section 1, of the Colorado Constitution (the initiative) which is set forth in the Colorado Constitutional Provisions Appendix at the end of this brief.

3. *Colorado Statutes.* Although the validity of House Bill 65, Forty-Fourth Colorado General Assembly, 1963 (sometimes referred to below as the "Lamb Bill", which implements Amendment 7) was expressly excluded from consideration by the court below (App. pp. 1-6), the bill may here become involved in the briefs or argument. Certain statistical information derived therefrom is set forth as Appendix B to Appellants' brief. This Court by order dated January 6, 1964 requested the inclusion of such information in the briefs submitted.

¹This Court by order dated January 6, 1964 dispensed with the printing of the record. The Clerk advised that counsel might print any parts of the record which they desired to bring to the attention of the Court as an Appendix to their briefs. Counsel for all of the Appellees have caused to be printed in a separate Appendix substantially all of the testimony given and the exhibits introduced in the court below. Page references in this separate Appendix will hereafter be referred to as "App. p.". In addition, the Clerk has permitted all of the Appellees to file as a separate document a report prepared by the Denver Research Institute, University of Denver, which was Defendants' Exhibit D in the court below and will here also be referred to as "Defendants' Exhibit D".

QUESTIONS PRESENTED

1. Where:

(a) the lower house of Colorado's bicameral state legislature is composed of members from districts apportioned on a strict population basis;

(b) the apportionment of seats in its senate is provided on a basis of districts, reasonably homogeneous within themselves and distinct from others and based upon considerations of that state's population and its geographical, economic, sociological and governmental characteristics (including comprehensive home rule provisions for urban residents); and

(c) the availability of initiative if necessary for statutory enactment assures majority rule on a per capita basis;

whether such apportionment of the senate is so arbitrary and capricious as to violate the Equal Protection Clause of the Fourteenth Amendment simply because it does not also result in numerical equality.

2. Where:

(a) the Colorado method of apportionment under attack results from a state constitutional amendment initiated by the people and adopted at the general election in 1962, wherein the vote of each voter was given equal weight;

(b) such apportionment prescribed by the people carried not only in the state as a whole but in every county thereof—urban as well as rural; and

(c) at the same election the electorate of the state as a whole and in every county thereof rejected another initiated amendment which would have apportioned both houses on a strict census basis;

whether such constitutional apportionment so adopted by the people should be nullified by this Court.

3. Whether this case should not be dismissed because there exists a plain and adequate remedy through the use of readily available, inexpensive and frequently invoked initiative provisions of the Colorado Constitution for the electorate (by a simple statewide majority vote) to further amend the apportionment of the state's legislature at any time they so desire.

STATEMENT

A. *The Parties.*

Plaintiffs below are Appellants here and brought an action attacking the apportionment of the Colorado bicameral legislature. Appellant Andres Lucas is a Colorado citizen, a resident of Westminster (a home-rule city in Adams County), a qualified voter, taxpayer and former member of the Colorado House of Representatives (Democrat). Appellant Archie L. Lisco is a Colorado citizen, a taxpayer, a resident of the City & County of Denver and a qualified voter.

Defendants below and Appellees here are the Colorado legislature and the Colorado Governor, Treasurer and Secretary of State.

Intervenors below and additional Appellees here, on whose behalf this brief is filed, were the proponents and initiators of Amendment 7, passed by the Colorado electorate in 1962, which apportions the Colorado legislature and which is here sometimes called the "Colorado plan." The Intervenors are: Edwin C. Johnson, three times Governor of Colorado, three times United States Senator, one time Lieutenant Governor and four times member of the Colorado General Assembly (Democrat); John C. Vivian, former Governor and Lieutenant Governor of Colorado (Republican); Joseph F. Little, lawyer and former Democratic

state chairman of Colorado and former Democratic Co-Chairman of Denver County (Democrat); Warwick Downing, attorney (Democrat); Wilbur M. Alter, former Chief Justice of the Supreme Court of Colorado (Republican). Intervenor Johnson, Vivian and Alter were members of the commission appointed by the Colorado Governor, Stephen L. R. McNichols (Democrat), in 1957 to study reapportionment of the Colorado legislature.

B. *The case below.*

Complaint was filed in the Federal District Court for Colorado in Action No. 7501 on March 28, 1962. A motion to dismiss was filed by the Colorado Attorney General, but no action was taken in that case because there was then pending an original proceeding before the Colorado Supreme Court wherein Appellants were also attacking the then current apportionment. *In the Matter of Legislative Apportionment*, 374 P. 2d 66 (July 6, 1962). When the Colorado Supreme Court declined to act, case No. 7637 was filed in the Federal District Court for Colorado three days later, on July 9, 1962.

The Plaintiffs in said cases, two of whom are Appellants herein, alleged that the then existing apportionment of the Colorado Legislature under the Constitution and statutes in effect at that time violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The sections of the Colorado Constitution then involved are set forth in Appellants' brief. (Br. p. 6) The Colorado statutes involved when the complaints were filed were Colorado Revised Statutes 1953, 63-1-1 to 63-1-8, also set forth by Appellants. (Br. pp. 67-74) The officials of the State of Colorado, by the Attorney General, filed motions and answers denying the jurisdiction of the lower court and the allegations of the complaints, except population figures as shown by the 1960 United States official census.

Added Appellees Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing and Wilbur M. Alter were allowed to intervene, and in their petition set forth the pending initiated amendments 7 and 8 for reapportionment of the Colorado Legislature. (App. p. 257 and p. 259)

Less than one month after the second complaint was filed, and on July 30, 1962, a one day hearing was held. The sole witnesses produced were those of Intervenor, added Appellees herein; a full transcript thereof is set forth in App. pp. 7-46. No additional evidence was introduced other than official census figures and statistical data based thereon.

Thereafter on August 10, 1962, a Memorandum Opinion was filed, the lower court concluding essentially that a *prima facie* case of invalidity of the former statutes had been established but withholding further orders pending action of the people on amendments 7 and 8 in the election to follow in November of the same year. *Lisco v. McNichols*, 208 F. Supp. 471.

At the November 1962 general election the electorate of the State of Colorado overwhelmingly and in every county adopted Amendment 7 and rejected Amendment 8. (App. p. 229, Intervenor's Exhibit C) The lower court then allowed Appellants to amend their complaints for the purpose of attacking the validity of the Constitution as amended. With relation to the presentation in the court below, the trial court said:

"The cases now before the court do not present the issues as they existed prior to the apportionment made by Amendment No. 7. As noted by our opinion in *Lisco v. McNichols*, 208 Fed. Supp. 471, 477, the then-existing disparities in each chamber were severe, the defendants presented no evidence to sustain the rationality of the apportionment, and witnesses for the intervenors, while defending the apportionment of the senate, recognized the malapportionment of the

house. The change by Amendment No. 7 was such as to require a trial de novo and we are concerned with the facts as finally presented." (App. p. 245)

At the trial *de novo* appellants again presented no evidence other than statistics. Appellees, however, submitted comprehensive details as to the physical and political facts in Colorado, the historical background and rationale of apportionment under Amendment 7. The evidence of appellee's included testimony of eminent qualified persons:

JOSEPH F. LITTLE, Esq. former Democratic Co-Chairman of the City and County of Denver and former Democratic Colorado State Chairman;

HON. EDWIN C. JOHNSON, three times Governor and three times United States Senator of Colorado, without question the most experienced living Colorado political figure;

DR. JAMES GRAFTON ROGERS, among other positions former Dean of the law schools of the University of Denver and the University of Colorado, former Professor of Law and Master of Timothy Dwight College at Yale University, former Assistant Secretary of State of the United States, former Mayor of Georgetown, Colorado, presently Chairman of the Board of Directors of the State Historical Society of Colorado, author of many publications on law, public affairs and history, without question one of Colorado's most distinguished living citizens in the field of education and public affairs.²

DR. JOHN P. LAWSON, Professor Emeritus of Political Science, University of Denver; and JOHN G. WELLES, Director of the Industrial Economics Division, and DEAN CODDINGTON, Research Economist, both of the Denver Research Institute, University of Denver. The testimony and evidence produced at the trial by appellees

²App. p. 55, Who's Who in America, 1962-1963, p. 2652.

is set forth in full (with deletion of one lengthy, irrelevant cross examination) in the appendix to appellees' briefs and in Defendants' Exhibit D filed herewith.

The Three-Judge Court below upheld the validity of the Colorado Constitution, *Lisco v. Love*, 219 F. Supp. 922, with one dissent. The majority opinion by Circuit Judge Breitenstein and presiding District Judge Arraj is set forth commencing at App. p. 235.

C. *Background of apportionment in Colorado.*

An examination of Colorado apportionment history reveals great activity from earliest territorial days to date. This history may be summarized as follows:

1. *Territorial Apportionment.*

While the Organic Act adopted by Congress for the Territory of Colorado (Act of Feb. 28, 1861, Ch. 59, 12 Stat. 172) called for apportionment of the territorial legislature on a population basis, the actual apportionment did not reflect this principle, contrary to Appellants' Statement (Br. p. 15). Actually there were three reapportionments during the sixteen years Colorado was a territory (Rogers, App. p. 61), none of which were on a strict population basis. For example, comparing Revised Statutes of Colorado, 1868, page 420, with the first official United States Census of 1870, we find that Summit County had one territorial Councilman (Senator) for 258 people, while the district composed of Boulder, Larimer and Weld Counties had one for a total of 4,413 people. The reason for the variation is no doubt expressed by the framers of the Constitution who said, "... every county will have a member in the House of Representatives, without regard to population. Such a provision in a state where many of its [26] counties are larger than whole states further east is a necessity..."³ (emphasis added).

³Proceedings of the Constitutional Convention, Smith-Brooks Press, p. 728 (1907).

2. State Apportionment.

(a) Contrary to the statement of Appellants (Br. p. 15), the record shows that neither house of the Colorado General Assembly has ever, before the adoption of the Colorado plan in 1962, been apportioned on a strict population basis. (Rogers, App. pp. 65-68) For example, a comparison of the senatorial districts established initially by the Constitution in 1876 (1935 Colo. Stat. Ann. Vol. 5; Constitution of Colorado Art. V, Sec. 48) with the 1870 census reveals that Park County was assigned one Senator for 447 people and Pueblo County one for 2,265 people. Just four years later, according to the 1880 census, the senate variation ranged from one Senator for 2,486 people in the Eleventh District to one Senator for 12,365 people in the Fifth District and one for 25,536 in the Thirteenth District.

(b) The Constitution of Colorado, Article V, Section 45, as it existed from 1876 until its amendment in 1962, provided for a state census and reapportionment following each state and federal census, setting forth that, "[t]he General Assembly shall . . . revise and adjust the apportionment for Senators and Representatives, on the basis of such enumeration *according to ratios to be fixed by law*." (Emphasis added). The officials of Colorado uniformly, and correctly, interpreted the State Constitution only as a limitation on the otherwise plenary powers of the General Assembly. (Rogers, App. pp. 78-79; *City and County of Denver v. Sweet*, 138 Colo. 41, 329 P. 2d 441 (1959)) Therefore, so long as the population ratios required by the former Constitution were established and observed, the people and their representatives were free to consider factors other than population in drawing district lines and in the resulting apportionment, and they acted

accordingly. (Johnson, App. p. 32; Rogers, App. pp. 77-79.)

The ratios actually adopted varied from time to time and, because of the difference in size of the house and senate, were different in each house. Generally, the method was to assign one seat to "X" number of voters and an additional seat to the same district for some multiple of "X". (App. p. 66) The existing statute immediately prior to 1962, Section 63-1-2, Colo. Rev. Stat. 1953, established the ratios in the senate at one for the first 19,000 of population in a district and one for each additional 50,000 or fraction over 48,000. The ratio so provided for the house was one representative for the first 8,000 of population in a district and one for each additional 25,500 of population or fraction over 22,400.

(c) From its admission as a state in 1876 to date there have been eight *major* reapportionments in Colorado, as follows:

(1) By the General Assembly in 1881, 1891, 1901, 1909, 1913 and 1953. (App. pp. 61-63; defendants' E exhibits; App. p. 213 et seq.; Opinion, App. p. 249)

(2) By the people, by initiated measures in 1932 and 1962. (App. pp. 249-250)

(d) In 1950, the citizens of Colorado adopted a referred measure increasing the size of the Legislature to 100 members. (1935 Colo. Stat. Ann., Vol. 5, 1950 Supp.; Constitution Article V, Sec. 46; Session Laws of Colorado 1951, p. 553)

(e) In 1954, 1956 and 1962 major reapportionment proposals, the first a referred measure and the last two initiated, were considered and rejected by the people. (Opinion, App. pp. 249-250; App. pp. 198-

201) The 1954 proposal was similar to Amendment 7 in that it placed the house on a population basis, but it did not change the pre-existing apportionment in the senate, giving no recognition at all to population shifts, particularly in the suburbs, and maintaining a clear-cut rural predominance. The 1956 and 1962 (No. 8) initiated proposals rejected by the people were substantially identical in effect and sought to apportion both houses of the General Assembly on a strict population basis. Both lost overwhelmingly, the first carrying only one county (Denver) in 1956; and the latter, Amendment No. 8 being defeated in all counties in 1962. (App. pp. 199, 201)

(f) During the period from 1956 to the date of the adoption of Amendment 7 and rejection of Amendment 8 in 1962, the Colorado General Assembly also was deeply engaged in continuing studies of apportionment.⁴ In 1957, the then Governor of Colorado, Hon. Stephen L. R. McNichols, appointed a Governor's Commission to study Colorado's apportionment problems. The Chairman of this Commission was Hon. Wilbur M. Alter, former Chief Justice of the Colorado Supreme Court, one of the Intervenor and Appellees herein, and the Chairman of the Executive Committee of that group was Hon. Edwin C. Johnson, also an intervenor and appellee herein. The report of the Governor's Commission, presented as a majority and minority report, formed the basis for Amendment No. 7 and Amendment No. 8, respectively. (App. pp. 199-201)

D. *The Colorado plan of apportionment under Amendment 7.*

As correctly stated by the Court below (App. p. 239), the 1962 amendment to the Colorado Constitution "... created a General Assembly composed of a Senate of 39 mem-

⁴Reapportionment of the Colorado General Assembly, Colorado Legislative Council, Research Publication No. 52, December, 1961.

bers and a House of Representatives of 65 members. The state is divided into 65 representative districts 'which shall be as nearly equal in population as may be' with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which 'shall be as nearly equal in population as may be.' Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census."

As the record shows, the rationale of the Colorado plan of apportionment was based on the following three major circumstances:

1. The first and most important circumstance is the variety of particular legislative interests of the State of Colorado arising from its topography and geography, its location, its history, its economy and the activities of its people. (App. pp. 94, 96, 103, 208)

2. The second of these is the existence of Article V, Section 1 of the Colorado Constitution, adopted in 1910, providing for both initiative and referendum as to both laws and amendments to the Constitution. (Colorado Constitutional Provisions Appendix)

3. The third circumstance considered is the widespread existence in Colorado of a comprehensive system of municipal home rule. By Article XX, Colorado Constitution, adopted in 1902 and 1912, the General Assembly has been stripped of legislative power as to matters of local and municipal concern to cities with a population of 2,000 or more which elect to become home rule cities. Colorado is among the four states in the Union following the most comprehensive doctrine as to the powers and "sovereignty" of home rule cities.⁵ Over one-half of the population of

⁵Johnson, "Municipal Home-Rule in Colorado," 37 DICTA 240 (1960).

Colorado, located substantially in the metropolitan areas of the state, including the individual Appellants Lucas and Lisco, now reside in home rule cities. (App. p. 234, Intervenor's Exhibit E) It should also be noted that under Article XX, Section 1, Denver is not only a city, but also a county, and a single Congressional and School District, so that annexation by Denver affects an automatic change in other significant boundaries. (App. p. 204)

Returning to the first point above mentioned, the lower court, commencing at App. p. 245, sets forth some of the details of the situation as follows:

"In Colorado the problem of districting the state for the election of members of the legislature and of apportioning legislators to those districts requires consideration of the state's heterogeneous characteristics. The politically determined boundaries of Colorado created a state which is not an economically or geographically homogeneous unit. The topography of the state is probably the most significant contributor to the diversity.

"Colorado has an area of 104,247 square miles which is almost equally divided between high plains in the east and rugged mountains in the west. It has an average altitude of 6800 feet above sea level and some 1500 peaks which rise to 10,000 feet or more. The Continental Divide crosses the state in a meandering line from north to south.

"In the eastern half of the state are high plains crossed by two major river systems, the South Platte and the Arkansas. The western half is a mountainous area drained principally by the Rio Grande and by the Colorado River and its tributaries. Major mountain

⁶The factual data supporting these findings of fact by the Court are contained primarily in the Denver Research Institute report, Defendants' Exhibit D, submitted with this brief.

ranges lie east of the Continental Divide in some sections of the state and have foothill areas of varying breadth separating the high peaks from the high plains.

"Geographically the state is divided into many regions with transportation difficulties of varying severity. The high plains are crossed from east to west by several railroads and main highways. The only north to south rail system and main highway system in this area lie just east of the foothills. The western part of the state is separated into many segments by mountain ranges and deep canyons. One main-line railroad crosses this section from east to west and none from north to south. Four principal highways provide east to west transportation by crossing the ranges at passes having altitudes of 9,000 to 12,000 feet. The north to south highways are less adequate and follow indirect routes. The terrain of the western section is such that some communities only a few miles apart on the map are many miles apart by the shortest useable road. Commercial air transportation between other than the metropolitan centers is limited.

"Colorado is further divided by the availability of water supply. The state is largely semi-arid with only isolated mountain areas having an annual precipitation of over 20 inches. That part of Colorado west of the Continental Divide has 37% of the total state land area and 69% of the state's surface water yield. The part east of the Continental Divide has 63% of the land area and 31% of the surface water supplies.⁷ Conflicts over the use of water have troubled the state continuously since its admission to the Union. The growth of the metropolitan areas would have been impossible without the transmountain diversion of water from the Colorado River and its tributaries. The divisive nature of the problem and the need for a

⁷Colorado Year Book, 1959-1961, p. 451. (footnote 22 in the opinion below)

state-wide water policy resulted in the creation of the Colorado Water Conservation Board,⁸ the members of which are chosen geographically by drainage basins. This recognition of the diverse interests of the competing areas has enabled Colorado to develop impressive irrigation and hydroelectric power projects.⁹

"The 1960 Federal Census gave Colorado a population of 1,753,947 persons. The population is concentrated heavily along the eastern edge of the foothills from Fort Collins on the north to Pueblo on the south. In this relatively narrow strip are located three Standard Metropolitan Statistical Areas as defined by the Census Bureau.¹⁰

"The metropolitan areas and their populations are: Denver (Adams, Arapahoe, Boulder, Denver and Jefferson Counties)—929,383; Colorado Springs (El Paso County)—143,742; Pueblo (Pueblo County)—118,707.

"Expert research economists testifying for the defendants divided the state into four regions, Western, Eastern, South Central and East Slope. The Western Region includes those counties west of the Continental Divide and those east of the Divide and entirely within the Front Range of mountains. The area is

⁸Colo. Rev. Stat. Ann., 1953 §§ 148-1-1 to 148-1-19. (footnote 23 in the opinion below)

⁹Colorado Year Book, supra, pp. 459-462. (footnote 24 in the opinion below)

¹⁰So far as pertinent the Census Bureau defines a Standard Metropolitan Statistical Area as: "a county or group of contiguous counties which contains at least one city of 50,000 inhabitants or more or 'twin cities' with a combined population of at least 50,000. In addition to the county, or counties, containing such a city or cities, contiguous counties are included in an SMSA if, according to certain criteria, they are essentially metropolitan in character and are socially and economically integrated with the central city. The criteria followed in the delineation of SMSA's relate to a city, or cities, of sufficient population size to constitute the central city and to the economic and social relationships with contiguous counties that are metropolitan in character." (footnote 25 in the opinion below)

largely mountainous with wide fluctuations in elevation, precipitation and temperature. About two-thirds of the population live in communities of less than 2,500 inhabitants or on farms. Over 65% of the area is in some form of government ownership. The major industries are agriculture (principally livestock raising), mining, and tourism.

"The Eastern Region is a part of the Great Plains. The area is dominated by agriculture with winter wheat the principal crop. Irrigation in the South Platte and Arkansas Valleys produces specialized crops. Livestock raising and feeding are important activities. There is some oil production.

"The South Central Region includes Huerfano and Las Animas Counties and the six counties drained by the Rio Grande. Agriculture (principally potato raising and livestock) and coal mining are the main industries.

"The East Slope Region includes the strip of counties from Larimer and Weld on the north through Pueblo on the south. The population is highly urbanized with 86.7% living in urban areas. The economy is diversified with manufacturing, agricultural production, mining, tourism, and trade and services contributing to the wealth of the area.

"The state is divided into 63 counties, the boundaries of which have remained substantially unchanged since 1913. Historically, contiguous counties have been grouped into representation districts in accordance with a general pattern which is distinguishable since the early days of statehood. Geographical divisions such as mountain ranges and river basins, accessibility, homogeneity, and population all have been recognized. The apportionment of membership to the districts has varied with shifts in population. In the early days of

statehood the mining counties were heavily populated. After the turn of the century the increased population of the agricultural counties in the high plains and the decline of the mining counties required changes in apportionment. In more recent years the growth of metropolitan areas has caused a demand for greater representation of the urban centers in the legislature."

Presented with this Brief and that of the Attorney General of Colorado, in addition to the Appendix, is Defendants' Exhibit D, prepared by disinterested experts, at the University of Denver, which shows in further detail the nature of the multitude of districting problems existing in Colorado.

We particularly invite the Court's attention to the colored topographic map on the inside back cover of Defendants' Exhibit D with senatorial district boundaries shown thereon in heavy lines. The Court's attention is also invited to Part II, pages 51 through 62, of this Defendants' Exhibit D. It demonstrates that the senatorial districts in Colorado are formed by grouping counties along the lines of major river valleys and systems of communication and travel. Further, it is apparent that many of the periphery counties of the state have more in common with portions of neighboring states than with the rest of Colorado.

For example, the witness Little testified as follows:

"For instance, let's take Jackson County. There are times in the year when Jackson County, the only way to get in, is to go to Fort Collins, up to Larimie, Wyoming and back to Walden, because Cameron Pass is closed and that's it. It's a part of Colorado. It has got to be fitted into some political pattern." (App. p. 175)

The attention of the Court is also invited to Inter-

venor's Exhibit B (App. p. 227) illustrating the land masses involved in Colorado's senate districts. The average size, per Senator, of all districts in Colorado is 2,673 square miles in area; in "metropolitan areas" the average district size per Senator is only 413 square miles; and the average district size per Senator outside the "metropolitan area" is 5,052 square miles (an average area ratio of 12 to 1). As stated by the lower court (App. p. 252):

"The realities of topographic conditions with their resulting effect on population may not be ignored. For an example, if the contention of the plaintiffs was to be accepted, Colorado would have one Senator for approximately every 45,000 persons. Two contiguous Western Region senatorial districts, Nos. 29 and 37, have a combined population of 51,675 persons inhabiting an area of 20,514 square miles."¹¹

Appellants contend (Br. p. 40), that there is no historical basis for apportionment in Colorado other than population, while stating, on the other hand, that the Constitution has been "regularly ignored by the rural dominated Assembly." (Br. p. 42) As above indicated, the facts are entirely the reverse. The record shows that, prior to Amendment 7, factors other than population were predominant as to both houses of the Colorado General Assembly. Amendment 7 is a new departure—to a strict population basis in the house, with, as the lower court found, population as the "prime, but not controlling, factor . . ." in the senate. (App. p. 253) Stated another way, the witness Rogers testified that the purpose of the Colorado plan was not ". . . the prevention of the majority of the population controlling . . .", but rather that it had ". . . almost an opposite purpose." (App. p. 82)

¹¹Each of nine states, Rhode Island, Delaware, Connecticut, Hawaii, New Jersey, Massachusetts, New Hampshire, Vermont and Maryland contains less area. (footnote 33 in the opinion below)

SUMMARY OF ARGUMENT

The Colorado plan provides a method of apportionment which is in contrast to that obtaining in the other five cases involving state legislative apportionment now before this Court. This contrast stems mainly from the fact that the Colorado voters through the readily available method of initiative cannot be frustrated in their will for apportionment, now or later. In fact, the Colorado plan was initiated and adopted in 1962 by the Colorado voters. The electorate prescribed an apportionment of the lower house of the Colorado legislature on a strict basis of population and its senate upon considerations not only of population but also upon true representation through homogeneous districts which have separate interests one from the other. The choice to the voters was clear since they had also presented to them, also by the initiative, another plan (Amendment No. 8) in which both houses of its legislature would have been apportioned on a strict population basis. The Colorado plan adopted, received an overwhelming vote in its favor, not only in the state as a whole, but in every county thereof. The strict population plan for both houses was rejected in the state as a whole and in every county thereof.

With this perspective in mind, the argument in this brief is twofold. First, the Colorado plan satisfies the requirements of equal protection of the law inasmuch as the lower house is apportioned strictly on population and there is a rational basis for the qualified departure from strict numerical equality in the apportionment of the Colorado Senate. Second, ultimate legislative power in the state resides in the people, and the ready availability of the frequently exercised right of initiative provides a remedy for the people of Colorado so that it is neither necessary, nor desirable, for this Court to enter the delicate areas of the form of state government and politics in the exercise of its discretionary equitable powers.

In a legislative apportionment case, the constitutional concept of equal protection does not require numerical equality in both houses of a bicameral legislature where there is a strict population apportionment in the lower house and where there is a rational basis for departure from such strict population basis in the senate. Under the Colorado plan the deviation from mere numbers in the apportionment of the senate leads to meaningful apportionment and results from recognition of diverse areas of concern within the state.

The Colorado Senate presents the only issue. The senate has been apportioned by the people of Colorado through initiative when in 1962 they adopted the Colorado plan and at the same time rejected a strict population basis for the senate. This action of the electorate is not irrevocable since they can at any biennial election again apportion either house of the legislature as they see fit. The Colorado plan recognizes population as the only basis for apportionment of the lower house and as a prime, but not controlling factor, in the apportionment of the senate. In addition to population, the senate apportionment gives effect to the important considerations of geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, conformity to county entities as political building blocks and "a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses." (App. p. 253)

That population was given due consideration is evident from the fact that the less populated rural areas do not dominate the urban or metropolitan areas of the state because no possible combination of Colorado senators from rural districts can result in a senate majority.

In evaluating this important matter of urban interests against rural interests, there must also be considered the fact that more than half of Colorado's total population

resides in cities having "home rule" wherein there is no dependence upon the state legislature for action in areas of local concern to each such community.

The reasonableness of the Colorado plan arises from all of the composite factors set forth. The facts are not in dispute and their cumulation bespeaks the rationality of the departure from equality based on unmeaningful numbers.

II

Plaintiffs below invoked the equitable jurisdiction of the court. While it must be recognized that this Court has held that a case involving a question on the apportionment of a state legislature presents a justiciable controversy, nevertheless the grant of relief lies in the sound discretion of the court. This discretion is particularly called for when there is a request for judicial intervention in state legislative apportionment. In such a case the equitable powers are to be exercised only under compelling circumstances. In the case of the constitutional provisions obtaining in Colorado, no such compelling circumstances exist.

It is the readily available, inexpensive and frequently exercised process of initiative which in the instant case constitutes the main circumstance militating against judicial intervention. Initiative has a twofold impact in this case. First, the Colorado plan, as to which equitable intervention is requested by the Appellants, was the result of recent overwhelming popular support for that plan in both rural and urban areas and the contemporaneous rejection of a plan based on numerical equality for both houses. Second, and perhaps even more importantly, the initiative by the people themselves is an adequate, efficacious and preferable remedy to correct any malapportionments which may result from shifts in population or for any other reason. Its availability¹² prevents the frustration of the popular will

¹²In the last fifty years, there have been sixty-two propositions of constitutional amendment submitted to Colorado voters through the initiative.

and puts in the hands of the people, on a state-wide majority vote basis, the means of permitting orderly state political evolution. In either instance, either in judging the Colorado plan as a fact resulting from initiative or in considering initiative as a remedy for the future, that initiative renders it unnecessary for this Court or any court in the federal system to intrude into the delicate areas of the form of state government and the expression of political will.

ARGUMENT

I. PERSPECTIVE OF THE CASE.

In *Baker v. Carr*, 369 U.S. 186 (1962) the Court first took jurisdiction in a case involving state legislative reapportionment. The merits of Tennessee's apportionment were not reached, although it was held that there was a justiciable cause of action. The Tennessee apportionment, according to the pleadings, involved flagrant examples of invidious discrimination against certain voters. It was a "crazy quilt" apportionment without a "rational design." (369 U.S. at 258) Moreover, the people of Tennessee were frustrated at all turns in their efforts to have the apportionment changed, because of the lack of initiative provisions and of inaction by the state legislature and courts. In short, when the people of Tennessee came to this Court they were "at the end of the line."

Since *Baker v. Carr* and at this term, the Court has heard argument in five other legislative reapportionment cases.¹³ These cases have involved a variety of apportionments and it may be that this Court will find some within and some without the requirements of the Equal Protection Clause of the Fourteenth Amendment. This is not a matter for us to argue here. We would be remiss, however, not to call to the attention of the Court the uniqueness of the Colorado plan and its total dissimilarity with these other

¹³Maryland, No. 29; Delaware, No. 307; Virginia, No. 69; New York, No. 20; and Alabama, Nos. 23, 27, 41.

five cases. This Court will, in the six cases argued this term, be setting forth the fundamental guidelines and standards of legislative reapportionment. The starting point of consideration was *Baker v. Carr*. We will show that, regardless of the disposition of the other five reapportionment cases, the end point and the point short of which the line should be drawn, beyond which judicial intervention is not required, is certainly the Colorado plan. Colorado is a Rocky Mountain state which has its own unique problems. It has solutions to those problems which are without parallel in the other cases heretofore argued, and Colorado's Constitution has vested its people with the right, power and ability to deal directly with any apportionment problems that may arise.

In greater detail at a later part of the brief we will analyze the Colorado plan of apportionment. Our immediate purpose here is to bring the Colorado plan into sharp relief with those involved in the reapportionment cases of Alabama, Maryland, Delaware, Virginia and New York. The distinctions are:

1. The Colorado plan had its genesis in the initiative of the people, was placed on the ballot by Colorado voters and was adopted by a majority of the voters in every Colorado county in the 1962 general election. None of the other five legislative apportionments was so adopted.

2. At the same 1962 general election and by a majority vote in every Colorado county the voters rejected a proposed initiated amendment to the constitution which would have apportioned both houses of the state legislature on a strict population basis. In none of the other reapportionment cases were the citizens of their respective states given this choice.

3. Under the Colorado plan, the lower house of the state's legislature is apportioned strictly on the basis of

population. None of the lower houses in the other five cases is so apportioned.

4. The record below will show that the Colorado Senate is apportioned on the basis of districts, reasonably homogeneous within themselves and distinct from others, which were cast to give effect to Colorado's economic, geographic, sociological and governmental characteristics and which are additionally based upon factors of population. The maximum possible deviation from strict representation by population between any two Colorado senatorial districts is 3.6 to 1, but this ratio of divergence has no meaningful effect upon the practical operations and control of the state legislature. For example, the state's three metropolitan areas, Denver, Pueblo and Colorado Springs, elect a majority of the senate. With the exception of a slightly lower ratio between senatorial districts existing in New York, none of the other four states has a senate ratio as nearly equal as Colorado's.

5. This case has a factual record evidencing a reasonable and rational basis for the Colorado plan. From a reading of the briefs, it appears that none of the other five cases has a comparable record or discloses as rational a basis for apportionment.

6. Colorado has readily available, inexpensive and frequently exercised initiative procedures whereby the people by majority vote may adopt, as they did the present Colorado plan, any apportionment of the legislature they may choose. None of the other five states involved in legislative reapportionment cases before this Court give such initiative to their citizens.

7. Colorado's Constitution grants any city or town with a population over 2,000 the right to legislative sovereignty through home rule over all matters of local or municipal concern. Comparable home rule provisions exist in

none of the constitutions of the states of Alabama, Maryland,¹⁴ Delaware, or Virginia.

The peculiar merits of this case should not become obfuscated by being commingled with the five cases previously argued. Colorado's plan should not be equated with these cases because its differences are material, substantial and cogent within the framework of the Equal Protection Clause. In any series of cases on the same problem, there must ultimately be a distinction between the right and the wrong, the permissible and the impermissible. We contend that unless the line is drawn in such a way as to validate the apportionment provisions of one or more of the other five reapportionment cases (in which case Colorado's plan is *a fortiori* valid) the line should be drawn here and the Colorado plan upheld.

II. THE EQUAL PROTECTION STANDARD IS ONE OF REASON, NOT NUMBERS.

To assert, as do Appellants, that Equal Protection is synonymous solely with numerical equality is to ignore the decisions of this Court to the contrary. See for example, the concurring opinion of Mr. Justice Douglas in *Baker v. Carr*, *supra*, wherein he states:

"The traditional test under the Equal Protection Clause has been whether a State has made 'an inviolable discrimination'" (369 U.S. at 244)

Although a specific determination of what constitutes such an invalid discrimination must relate to the factual setting of a given case, it is clear that mere numbers do not lead to meaningful determinations of what constitutes equal protection. As stated in *MacDougall v. Green*, 335 U.S. 281 (1948):

"To assume that political power is a function exclusively of numbers is to disregard the practicalities of

¹⁴Compare Maryland Constitution, Art. 11-E, §§ 3, 5 and 6.

government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States.” (335 U.S. at 283-284)

See also *Walters v. City of St. Louis*, 347 U.S. 231 (1954), wherein the Court reaffirms that “. . . [e]qual protection does not require identity of treatment.” (347 U.S. at 237)

Assuming then that numerical equality is not a constitutional requisite under the Equal Protection Clause, we turn briefly to the more positive standards which this Court has established. Basically they are that the deviation or discrimination against a particular class of citizens must have a “rational basis” (*Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959)) and, in the factual context, be reasonable. As stated by Mr. Chief Justice Warren in discussing the Maryland Sunday closing laws:

“Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify

it." *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961)

The principles of these cases are in point and the standards established apply here with full force. As noted by Mr. Justice Stewart in his concurring opinion in *Baker v. Carr*, *supra*, and after he cites *MacDougall v. Green*, *supra*, and *McGowan v. Maryland*, *supra*, "Today's decision does not turn its back on these settled precedents." (369 U.S. at 266)

In the next part of this brief we will show how the facts of this case, as they were developed in and found by the court below, demonstrate the rational and reasonable basis within the framework of the Equal Protection Clause for the challenged apportionment of the Colorado legislature.

III. THE METHOD OF APPORTIONING THE COLORADO LEGISLATURE IS REASONABLE AND RATIONAL.

A. The voters of Colorado through the initiative overwhelmingly adopted the present method of apportioning the Colorado legislature.

The factual Statement of this brief itself, without further argument, demonstrates that the Colorado electorate in every county of the state overwhelmingly adopted the Colorado plan now under attack and at the same time also overwhelmingly rejected a strict adherence to a numerical equality system for *both* houses of their legislature. The majority popular vote received in every county by the plan is unique in the history of Colorado politics. (App. p. 201) The vote was that of an informed electorate, fully educated as to the merits and provisions of the Colorado plan, which it adopted, and the rival plan, which it rejected. There was a well-organized campaign conducted by the proponents of each plan throughout the state. (App. p. 201) The interest engendered in the issue by this campaign is evidenced by the fact that more voters expressed their opinion by

voting on Amendment 7 than on any of the seven other issues on the ballot.¹⁵

This vote followed ten years of intensive study by the Colorado Legislature, the Report of the Governor's Advisory Commission and two votes of the people on apportionment proposals during this period. (App. pp. 198-200) Never before in Colorado history had so many voters been so well-informed by the proponents of the two measures, and by the newspapers of the state. (App. p. 201)

¹⁵**Abstract of Votes Cast, 1962 General Election**, compiled by Colorado Secretary of State and published by The Dingerton Press, Denver, Colorado (1962) pp. 28-29. This abstract shows that the three propositions receiving the heaviest vote were Amendment 7, Amendment 1, (relating to judicial reorganization) and Amendment 8, in that order. Colorado voters had eight proposed amendments to the State Constitution on the 1962 ballot. The table below is a brief summary of the subjects of these amendments, the total vote on each, and the result.

	Total Votes
Amendment No. 1—relating to judicial reorganization	472,792—Adopted
Amendment No. 2—relating to providing a separate civil service system for policemen and firemen in Denver	411,603—Rejected
Amendment No. 3—relating to basing Colorado Income Tax Returns on the Federal Form	433,579—Adopted
Amendment No. 4—relating to elimination of the one year residency requirement as a qualification for voters in presidential elections	441,265—Adopted
Amendment No. 5—relating to uniform assessment of taxable property	427,890—Adopted
Amendment No. 6—relating to the terms, election and payment of certain county and local officers	410,309—Rejected
Amendment No. 7—relating to reapportionment	478,425—Adopted
Amendment No. 8—relating to reapportionment	461,571—Rejected

To argue that Amendment 7 was "cleverly merchandised" (Appellants' Brief p. 59) to an uninformed electorate by a political group representing minority and insular interests¹⁶ is to argue against the very basis of democracy. If the Colorado electorate was uninformed, misled and foolish in 1962, it is hard to see how any electorate could ever be said to be responsible and mature. Such an argument urges substitution of judicial judgment for that of the electorate, and totally ignores the guarantee of a republican form of government. Appellants claim to be asking this Court to allow the majority to govern itself, and yet they argue that this same majority was incapable of protecting its interests in 1962. If one starts from the assumption that the majority is capable of protecting its own interests, as Appellants must, then the only reasonable conclusion is that we must respect the majority's 1962 decision on apportionment.

We do not urge that a majority of voters may deprive a minority of constitutionally guaranteed rights or that a majority vote is a substitute for equal protection. Such would be the case if the majority had singled out a minority for discriminatory treatment or even if a minority had itself acquiesced in or agreed to being discriminated against. This case presents a fundamentally different situation. Here the majority of voters in every county of the State of Colorado, including the counties wherein Appellants reside and which they claim are discriminated against, has voted to impose restraints upon its own rule. Appellants in effect have alleged discrimination by the majority against itself. In point of fact, it should be regarded as a voluntary relaxing of the power of the majority over the

¹⁶Contrary to the opinion of the dissenting judge in the court below, espoused by Appellants here (Br. p. 59), Amendment 7 was not politically inspired. There is not even a scintilla of evidence to support this conclusion. On the contrary, both the testimony and the political background of the intervenors indicate the bipartisan support which the plan received. Intervenors Johnson, Downing and Little are members of the Democratic Party, while intervenors Alter and Vivian are Republicans.

minority, and this is by no means unreasonable. The interests of the Denver metropolitan area, for example, are interwoven in many ways with the recreational, mining and agricultural areas of the state and Denver's welfare depends in significant measure on the areas. (Rogers, App. p. 103) Further, these self-imposed restraints are by no means irrevocable, (as will be discussed below in part IV relating to Colorado's liberal initiative provisions) and if the majority should later feel that such limitations on strict majority rule are no longer desired it can modify or eliminate such limitations to whatever extent it desires. We know of no other case, pending or past, factually or analogously comparable to this case.

B. The apportionment of the Colorado Senate is based upon considerations of geography (including topography, transportation, accessibility and compactness of territory), water problems, regional communities of interest and distinguishing characteristics of the various districts.

The purpose of senatorial apportionment in Colorado is to create balanced and homogeneous districts, and within that framework to achieve a balance between and among them. The purpose is not to give one person's vote more weight than another's, but to recognize and create districts for which a representative is appropriate. For example, the Colorado plan does not apportion each county a senator even though counties are regarded as the building blocks of Colorado government (App. p. 208) Thus, even though county boundary lines are respected and counties are not split up to form senatorial districts, 14 of 39 senatorial districts are comprised of more than one county. In addition, each of the eight populous eastern slope counties apportioned more than one senator is subdistricted. (App. p. 257)

The history of Colorado reapportionments and of the present Colorado plan is one of attempts to give effect to the heterogeneous nature of the state and to keep pace with shifting populations. These attempts span the entire his-

tory of Colorado, the legislature having been apportioned or reapportioned twelve times, three times during the territorial period from 1861 to 1876 and nine times since Colorado became a state in 1876. (App. p. 61 and pp. 213-226) This is more than once every ten years. Two of the reapportionments, in 1932 and 1962, were by initiative of the people. (App. pp. 79 and 257)

The court below, as set out in greater detail in the Statement, *supra*, elaborates upon the rational bases for districting the state under the Colorado plan. The state is economically and geographically divisible into four basic areas, the mountainous Western region; the populous Eastern slope lying immediately east of the mountains; the chronically depressed South Central region; and, the Eastern region, a vast area of the Great Plains. Within these regions lie the various senatorial districts, each representing within its boundaries particular identifying characteristics. For example, a prime factor taken into consideration in forming these districts is the existence in Colorado of four major river drainage areas, those of the Arkansas, South Platte, Rio Grande and Colorado Rivers. (Defendants' Exhibit D, Part II, p. 52) These rivers rise in Colorado and flow into other states. They are the source of great benefit to the districts through which they flow, great problems in relation to the states other than Colorado into which they flow and serious competition among the areas themselves within Colorado because of diversion of water from one drainage area to another.¹⁷

Another identifying characteristic particularly significant in certain districts of the Western region is that

¹⁷See: *City and County of Denver v. Northern Colorado Water Conservancy District*, 130 Colo. 375, 276 P.2d 992 (1954); *United States v. Northern Colorado Water Conservancy District, et al.*, Civil No. 2782, pending D. Colo.; *Colorado River Water Conservation District et al., petitioners*, Civil Nos. 5016 and 5017, pending D. Colo.; *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Arizona v. California*, 298 U.S. 558 (1936); *Wyoming v. Colorado*, 298 U.S. 573 (1936); *Kansas v. Colorado*, 206 U.S. 46 (1907).

of accessibility. Colorado, in addition to being divided by the Continental Divide which bisects the state north and south, has its Western half sub-divided by a series of other mountain ranges and masses which contain some of the highest peaks in the United States.¹⁸ These mountains tend to isolate the various western senatorial districts and to impede north-south transportation. Consider for example, the problem of access to his constituents a senator from District 19¹⁹ in the southwest corner of the State would have if it were expanded to include Hinsdale County which, looking at a regular map,²⁰ would more logically appear to belong in such district instead of being a landlocked peninsula of District 11. Referring to the topographical map,²¹ however, the illusory nature of Hinsdale's juxtaposition to District 19 becomes apparent. Hinsdale County and Lake City, its County Seat, are separated from District 19 by the San Juan mountains, as rugged as any in the United States outside of Alaska. It is literally impossible to travel from the district to this county seat, scant miles away, by automobile, train, or plane, without going around the mountains through two other districts to get there.

Finally, the immense land area of Colorado and, indeed, of some of the districts, is a factor to be taken into consideration. Senatorial District 13,²² for example, encompasses 8,866,000 acres (13,853 square miles of land) and Senatorial District 18,²³ 6,524,160 acres (10,194 square miles of land). (App. pp. 227-228) Each of these districts

¹⁸See the topographical map on the inside back cover of Defendants' Exhibit D.

¹⁹Montezuma, La Plata, San Juan and Archuleta Counties. See the map on the inside front cover of Defendants' Exhibit D.

²⁰Ibid.

²¹Inside back cover, Defendants' Exhibit D.

²²Moffat, Rio Blanco, Routt, Jackson and Grand Counties, Defendants' Exhibit D, Part I, p. 14.

²³Elbert, Lincoln, Cheyenne, Kit Carson and Kiowa Counties, Defendants' Exhibit D, Part I, p. 31.

is larger than either Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, Rhode Island or Vermont. With such a vast land area served by relatively inadequate rural roads, they are problem enough for one state senator to traverse and represent.

Without going any further into a detailed analysis of the wholly uncontradicted evidence introduced at the trial below, substantially all of which is set forth in Appellees' separate Appendix hereto, it is sufficient here to note the following. Based on the factual data contained in the Economic Analysis of State Senatorial Districts in Colorado prepared by the wholly independent Denver Research Institute of the University of Denver (Defendants Exhibit D); upon the testimony of witnesses intimately connected with and versed in the historical, economic, political, social and geographical nature and character of Colorado (App. pp. 8-195) and upon the testimony of the drafters and proponents of the Colorado plan (App. pp. 197-211) there is substantial, rational and uncontradicted support for the facts found by the court below. After an extended discussion and analysis of the evidence (App. pp. 245-253) to which reference is here made without belaboring the matter and restating the same points, the court below concluded:

"We are convinced that the apportionment of the Senate by Amendment No. 7 recognized population as a prime, but not controlling, factor and gives effect to such important considerations as geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, conformity to historical divisions such as county lines and prior representation districts, and 'a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses'." (App. p. 253)

This is the Colorado plan, a plan drafted and adopted to reflect the characteristics and the problems of Colorado.

C. Population is one of the factors upon which the apportionment of the Colorado Senate is based.

The population of Colorado as reflected in the 1960 United States Census is 1,753,947. The Census designates the following three areas in the State as "Standard Metropolitan Areas": Denver, comprised of Adams, Arapahoe, Boulder, Denver and Jefferson Counties and having a population of 929,383; Colorado Springs, consisting of El Paso County and having a population of 143,742; and Pueblo, consisting of Pueblo County and having a population of 118,707. The combined population of these three urban areas is 1,191,832 or 67.95% of the total state population. (App. pp. 227-228) These areas, under the Colorado plan, will elect to the lower house of the Colorado legislature a percentage of representatives approximately equal to their percentage of the state population. These three metropolitan areas also will elect a majority, 20 out of 39, of the state's senators. (App. pp. 227-228) Thus, although mathematical equality is not arrived at in the election of senators, the populous eastern slope of the state, where all of the state's metropolitan areas are situated and where population growth has been most rapid, controls a majority of the seats in both houses of the legislature.

Consideration was also given in the Colorado plan to the balancing factors within the multi-county Denver metropolitan area. (App. pp. 179-180). For years there have been conflicts, primarily relating to annexations, between the City and County of Denver²⁴ and its suburbs in surrounding counties. (App. pp. 179-180) See *City and County of Denver v. Board of County Commissioners of Arapahoe County*, 376 P. 2d 981 (Colo. 1962) and *Board of County Commissioners of Jefferson County v. City and County of Denver*, 372 P. 2d 152 (Colo. 1962). The balancing was achieved by increasing the number of sena-

²⁴The City and County of Denver is a municipal entity and its boundaries are coterminous.

tors for each suburban county (Adams, Arapahoe, Jefferson and Boulder), from one to two so that their combined representation of 8 senators for a population of 435,496 equaled that of the City and County of Denver, which is allotted 8 senators for a population of 493,887.

In making this argument we are not unmindful of Appellants' charge that all of the metropolitan areas are underrepresented in the Colorado Senate. On a strict count of numbers of persons per senator they are, but as noted above and as brought out in the testimony, they still control both houses of the Colorado legislature. Thus, although a theoretical minority of the voters representing 36% of the population can elect a majority (twenty) of the senators, the percentage has no real meaning in terms of the legislative process. It has become common to talk of minority dominance of state legislatures by rural elements. Yet, under the Colorado plan, no possible combination of Colorado senators from rural districts, assuming *arguendo* they would vote as a block, results in a senate majority. Indeed, the 36% figure referred to above requires the inclusion of two senatorial districts from the multidistricted Denver metropolitan area²⁵ as well as two other districts which include sizeable cities.²⁶ To seize upon this percentage figure of 36 is (1) to present a grossly misleading simplification of the legislative process and (2) to display complete naivete of that process. It can truly only be called a "numbers game."

If this were not enough to demonstrate how numbers do not always tell the full story, we call the Court's attention to the following. Appellants speak, regarding the Colorado Senate, of a "representational distortion in some cases approximating 4 to 1." (Appellants' brief, p. 3). The ratio referred to is that arrived at by dividing the census

²⁵Two from Boulder County, App. p. 227.

²⁶Fort Collins (Larimer County) and part of Greeley (Weld County), App. p. 227.

population of the 4th Senate District (Las Animas County with a population of 19,983) into that of the 3rd district (El Paso County with a census population per senator of 71, 871) and arriving at a ratio of 3.6 to 1. (App. p. 227) This approach ignores the significance in El Paso County of four major military installations (Ent Air Force Base, NORAD Headquarters, The Air Force Academy and Fort Carson) (App. p. 170) many of whose personnel are enumerated in the census²⁷ but are citizens of other states and vote outside of Colorado.²⁸ When the number of registered voters in Las Animas County (11,654) is compared with the registered voters per senator in El Paso County (28,251) the ratio drops to 2.4 (App. pp. 232-233). Indeed, wholly different ratios between the various districts may be arrived at by using the registered voter statistics rather than population, and neither set of statistics should be *ipso facto* controlling.

None of the above is advanced to suggest that ratios of 4 to 1 or of 2 to 1 or percentages of 36% or 51% are intrinsically good or bad, or reasonable or not insofar as the Colorado Senate is concerned. Rather, it is suggested that (1) numbers, percentages and ratios unrelated to other factors have little probative value; and (2) that before numbers are brought into play, an initial inquiry should be made into their source and whether it is meaningful. As is illustrated above, census figures alone do not tell the whole story.

As we also submit is illustrated above, the apportionment of the Colorado legislature and, specifically, the Colorado Senate, does not disregard the important factor of

²⁷"Persons in the Armed Forces quartered on military installations were enumerated as residents of the States, counties, and minor civil divisions in which their installations were located." (1960 United States Census of Population, Colorado, Number PC(1)(7A)p. v)

²⁸These noncitizen residents not only vote in other states but as transients are to a great extent not affected by what transpires in the Colorado legislature or by Colorado's laws.

population. From the practical standpoint of state politics it leaves Colorado's three highly populated metropolitan areas in control of both houses of the legislature and, additionally, effects a balancing of interests and populations within the most populous of those areas, metropolitan Denver.

D. The Home Rule provisions of the Colorado Constitution accord to most Colorado cities a high degree of legislative autonomy over their own affairs.

Article XX, Section 6 of the Colorado Constitution vests any city or town with a population of 2,000 or more inhabitants with the power to "make, amend, add to or replace [its] charter . . . which shall be its organic law and extend to all its local and municipal matters": Section 6 provides that:

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."

Section 6 then enumerates a large number of specific powers given the home rule cities and continues:

"It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

"The statutes of the State of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

The effect of the home rule constitutional provision has been described in a recent case by the Colorado Supreme Court as follows:

"By the Home Rule Amendment the General Assembly had been deprived of *all* the power it might otherwise have had to legislate concerning matters of local and municipal concern. Particularly is this true where a home rule city has adopted a charter or ordinances governing such matters." *Four-County Metropolitan Capital Improvement District v. Board of County Commissioners of Adams County*, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962).

This power remains despite the fact that there may be questions from time to time as to what are "local and municipal matters." See: *Canon City v. Merris*, 137 Colo. 169, 323 P.2d 614 (1958).

At the present there are 26 home rule cities in Colorado with a total combined population of 976,888 or 56% of the state's total population.²⁹ Of these 976,888 people, 821,688 live in home rule cities located in the state's "metropolitan areas".³⁰ These "metropolitan areas" are comprised of the counties of Adams, Arapahoe, Boulder, Denver, El Paso, Jefferson and Pueblo³¹ and are the identical areas alleged to be underrepresented in the legislature.

The net effect of home rule as to these cities and as to any cities which hereafter qualify and adopt home rule is to remove from the Colorado legislature a power to enact legislation as to local matters affecting them. This legislative power of home rule cities was another factor con-

²⁹Intervenor's Exhibit E, App. p. 234. Rifle, with a population of 2,135, was erroneously omitted from Exhibit E, 1963 (Directory of Municipal and County Officers in Colorado, published by the Colorado Municipal League, Boulder, Colorado.)

³⁰Intervenor's Exhibit E, App. p. 234, erroneously fails to designate Westminster as being in a metropolitan area.

³¹1960 Colo. Census, *supra*, p. 7-15.

sidered in the Colorado plan. (App. p. 204) If residents of home rule cities, having plenary power as to matters of their own local concern, and having no interest in matters of local concern elsewhere, were to be accorded overwhelming majorities in both houses of the legislature, the result would be arbitrary and irrational in the extreme. It would impose upon the people of the State of Colorado, residing outside of home rule cities, rule by a disinterested majority, contrary to familiar principles of fair play.

E. The composite factors behind the Colorado plan bespeak its reasonableness.

The reasonableness of the Colorado plan rests with all of the above factors.³² The facts, as noted by the court below (App. p. 239), are not here in dispute. It is submitted that these cumulative facts bespeak of a reasoned and rational approach to the apportionment of the Colorado legislature within the framework of the Equal Protection Clause of the Fourteenth Amendment.

IV. THE APPORTIONMENT OF THE COLORADO LEGISLATURE DOES NOT PRESENT A SITUATION WHERE EQUITY NEED OR SHOULD INTERVENE.

A. The equitable power of this Court or of any Court in the federal system should not be exercised when no need for such exercise exists.

The equitable powers of this Court and the lower Federal Court have been invoked by Appellants. They seek both a declaration of the invalidity of the Colorado plan (Appellants' brief p. 65) and specific guidance from this Court as to a proper method of apportioning the Colorado

³²We have not, in view of the extensive treatment accorded it in the other five reapportionment cases, discussed the so-called "Federal analogy". We do submit, however, that regardless of the merits of the analogy *per se* and regardless of what factors lay behind the "Great Compromise" between the states, we cannot divorce consideration of what is fair and reasonable from the plan of apportioning Congress. The concept of bicameralism represented thereby and embodied in the Constitution, is ingrained in the American idea of what constitutes fair representative government. Colorado's close parallel to the apportionment of Congress reflects this idea.

legislature. (Appellants' brief p. 66) This request of Appellants presupposes that this case is a proper one for the Court to exercise its equitable powers. As will be shown, this is not such a case.

This case involves the balancing of law and politics, of the judicial and legislative branches of government, and of the Federal power and that of the states. It even balances the Federal judiciary against the voters of a state, in a situation where no discrimination against a minority is involved. Here, the role of the courts is as delicate as the balances to be maintained. This Court has historically approached problems in this area with necessary caution and, indeed, great reluctance.³³ We would not, therefore, be amiss to speak first of those principles which should in their application guide the action to be taken or remedies to be applied in this case.

We begin with the familiar principles that the exercise of the power of a court of equity is discretionary (*American Federation of Labor v. Watson*, 327 U.S. 582, 593 (1946)) and that where those who invoke the exercise of equity have other and more appropriate means of redress, they should be left to those means. *Matthews v. Rodgers*, 284 U.S. 521, 525-526 (1932)³⁴ In a reapportionment case the need for equitable intervention should be grounded on a showing of "... the most compelling circumstances ..." requiring such intervention. *Colegrove v. Green*, 328 U.S. 549, 565 (1946) (concurring opinion of Rutledge, J. See also his concurring opinion in *MacDougall v. Green*, 335 U.S. 281, 284 (1948).)

This case presents no such compelling circumstances for, as will be shown in the following section, complete,

³³See: *Pennsylvania v. Williams*, 294 U.S. 176 (1935); *Luther v. Borden*, 7 How. 1 (1849).

³⁴In taking this position we are not unmindful of the fact that under *Baker v. Carr*, *supra*, the matter here is justiciable. Our argument goes not to justiciability but to equitable discretion.

adequate, inexpensive and readily available relief is now and will be available to any dissidents through the initiative and referendum to correct any deficiencies in the Colorado apportionment which they find. The proper means of preserving the delicate balance of state vis-a-vis federal responsibility in this apportionment area has been pointed out by Mr. Justice Clark in his concurring opinion in *Baker v. Carr*, 369 U.S. 186 (1962) wherein he states:

"Although I find the Tennessee apportionment statute statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.' Tennessee has no initiative and referendum. I have searched diligently for other 'practical opportunities' present under the law. I find none other than through the federal courts." (369 U.S. at 258-259)

Where such opportunity for the electorate to impose its will at the polls exists, where the electorate has in the past so used its opportunity and where such opportunity continues to be readily available, the Federal Courts should as a matter of judicial discretion decline to exercise their equitable powers.

B. There exists no need in the field of Colorado legislative apportionment for equitable intervention, because of the readily available remedy of initiative and referendum.

Without in any manner detracting from our position that the present apportionment of the Colorado legislature is consonant with the Equal Protection Clause of the Fourteenth Amendment, we here bring to the attention of the Court the liberal, inexpensive and frequently invoked provisions of the Colorado Constitution giving the electorate

complete and final control through the initiative and referendum over the state's constitution and its laws.

The basic initiative and referendum provisions are contained in Article V, Section 1 of the Colorado Constitution³⁵ which vests the ultimate legislative power of the state in the people. Section 1 provides in material part as to initiative:

"The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly.

"The first power hereby reserved by the people is the initiative, and at least eight per cent. of the legal voters shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, shall be addressed to and filed with the secretary of state at least four months before the election at which they are to be voted upon All elections on measures referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been can-

³⁵The full text of Section 1 is set forth at the end of this brief in the Colorado Constitutional Provisions Appendix.

vassed The whole number of votes cast for secretary of state at the regular general election last preceding the filing of any petition for the initiative or referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted."

Article V, Section 1 is implemented by Chapter 70 of the Colorado Revised Statutes 1953, as amended. This chapter contains provision for publication of proposed laws and constitutional amendments in newspapers throughout the state. (Sec. 70-1-2, Colo. Rev. Stat. 1953) It also provides that no person may "... receive any money or thing of value in consideration of or as an inducement to the circulation of [an initiative] petition by him" (Sec. 70-1-6, Colo. Rev. Stat. 1953, as amended.)

From the foregoing, the following observations regarding the Colorado initiative are apparent:

- a. The ultimate authority both for making laws and amending the state's constitution rests in the true sense with the Colorado electorate.
- b. The signers of the initiative petitions need not come from any particular county, group or political party.
- c. To place an initiated matter on the ballot requires a petition containing the signatures of only eight per cent of the total "... number of votes cast for secretary of state . . ." at the preceding general election. (In the 1962 general election 578,186³⁶ votes were so cast. Eight per cent thereof equals 46,255 signatures, or only 2.6% of the state's 1960 population).

³⁶Abstract of Votes Cast, General Election 1962, compiled by Colorado Secretary of State and published by The Dington Press, Denver, Colorado (1962) p. 25.

- d. A law or amendment to the Colorado Constitution may be adopted by the simple, statewide majority vote of those who cast votes as to the law or amendment involved. It does not require more than a simple majority, nor a majority of the qualified electors; nor even of those voting at the election; only, to repeat, a majority of those voting on the particular measure.
- e. The initiative is readily available and is relatively inexpensive. The cost of pressing an initiated measure through to enactment will vary with the popular support which the measure has and with the number of volunteers who can be enlisted to work in its behalf. By statute, no one may be paid to circulate an initiative petition. (Sec. 70-1-6 Colo. Rev. Stat. 1953, as amended). Volunteers, therefore, must circulate the petitions and they can also provide legal advice, notarizations, printing, speakers and releases to the press and other publicity media. If the cause is good, as would be the case if an invidious discrimination existed, there would always be and always has been a wealth of such volunteers. Such a cause would also elicit adequate financial contributions for any other expenses not covered by voluntary services. Therefore, the principal item of expense in initiating an amendment merely is that of formal publication thereof. In the 1962 election, this amounted to only \$2,250.60 for Amendment 7 (the Colorado plan) and \$3,246.32 for Amendment 8 (the plan to apportion the senate on the basis of population).³⁷

We have examined the constitutions of the fifty states and,

³⁷Source: Records of the Office of the Colorado Secretary of State.

with the exception of North Dakota,³⁸ find no other provisions for initiating constitutional amendments as liberal as those of Colorado.³⁹

Should the Colorado electorate or any individual voters feel now or at some future time that unreasonable inequalities exist or have crept into the apportionment of the Colorado legislature by virtue of shifts of population or for any other reason, a ready solution for their grievance rests with the initiative provisions of the Colorado Constitution. Indeed, Appellants have the opportunity at the coming general election this fall to place their suggested apportionment (Appellants' brief, Appendix C) on the ballot, rather than attempt to place the burden of reapportionment upon this Court. Since they have suggested what they consider a happy solution, let them put it up to the people.

Since the Constitutional and statutory provisions above cited do not convey in a complete sense the true spirit of the initiative and referendum in Colorado, we set forth below a dramatic illustration of the frequency of their exercise at the polls by the voters of Colorado. It is a survey compiled by the Colorado Legislative Reference Office, State Capitol, Denver, Colorado, showing the number, the passage and the rejection of all initiated and referred constitutional amendments voted on by the people of Colorado since the inception of the initiative.

³⁸In North Dakota the initiative petitions for placing an amendment on the ballot need only be signed by 10,000 voters and an amendment passes on receiving a majority of the votes cast therefor. (N.D. Const. Art. 2, § 25)

³⁹California (Calif. Const. Art. 4, § 1) comes the closest, requiring petitions signed by voters equal in number to 8% of the votes cast for governor in the preceding election. Missouri (Mo. Const. Art. 3, § 50) requires petitions bearing signatures equal in number to 8% of the legal voters in each of 3rds of the Congressional Districts in the state. Michigan (Mich. Const. Art. 17, § 2) requires initiative petitions to bear the signatures of 10% of the number of voters at the last general election. All of the other states which provide for initiated amendments impose more stringent requirements. These states (the only other ones providing for such initiated constitutional amendments) and their respective constitutional provisions are: Arkansas (Ark. Const. Amdt. No. 7), Arizona (Ariz. Const. Art. 4, Part 1, § 1), Massachusetts (Mass. Const. Art. 48), Nebraska (Neb. Const. Art. 3, § 2), Ohio (Ohio Const. Art. 2, § 1a), Oklahoma (Okla. Const. Art. 5, § 2) and Oregon (Ore. Const. Art. 4, § 1).

COLORADO INITIATIVE AND REFERENDUM

1912 to 1962, Inclusive

Year	Total Initiated and Referred	Constitutional Amendments Voted Upon					
		Initiated by People		Referred by Assembly			
		Number	Adopted	Defeated	Number	Adopted	Defeated
1912	14	10	3	7	4	0	4
1914	8	5	1	4	3	1	2
1916	2	2	0	2	0	0	0
1918	3	1	1	0	2	2	0
1920	5	2	1	1	3	1	2
1922	7	3	1	2	4	1	3
1924	3	1	0	1	2	0	2
1926	5	1	0	1	4	0	4
1928	5	2	0	2	3	1	2
1930	1	1	0	1	0	0	0
1932	5	4	1	3	1	0	1
1934	6	3	1	2	3	0	3
1936	7	4	2	2	3	2	1
1938	2	2	0	2	0	0	0
1940	4	4	0	4	0	0	0
1942	1	0	0	0	1	0	1
1944	3	2	1	1	1	1	0
1946	2	0	0	0	2	1	1
1948	3	2	0	2	1	1	0
1950	3	1	0	1	2	2	0
1952	5	2	0	2	3	1	2
1954	7	1	1	0	6	1	5
1956	5	2	1	1	3	2	1
1958	5	2	1	1	3	0	3
1960	5	3	0	3	2	0	2
1962	8	2	1	1	6	4	2
	124	62	16	46	62	21	41

The fact of greatest significance in the table is, of course, the frequency of the exercise of the initiative. However, note should also be taken of the large number of initiated amendments which have not passed. As testified by former Governor Johnson (App. p. 201) there is more often than not a negative vote as to amendments on the

ballot. An amendment which the voters do not understand or which does not have popular support is unlikely to pass.⁴⁰ Such was not the case with the Colorado plan (Amendment 7) and such will not be the case hereafter for any measure which the people of Colorado truly support.

This case, therefore, presents none of the factors which have heretofore caused this Court to deem equitable action necessary. As we demonstrated in the first part of our brief, no invidious inequalities exist in the present apportionment of the legislature. Assuming, as Appellants maintain, that population shifts in the future will create gross inequalities, the electorate by its own initiative and by simple majority vote can correct such inequalities. The incessant references throughout Appellants' brief to the apportionment of the Colorado legislature being "frozen in perpetuity"⁴¹ are absolutely contrary to fact. The apportionment of the legislature, be it through law or constitutional amendment is not, never has been and as long as the initiative is maintained never will be frozen in Colorado.

As noted above, this mixed area of law and politics is one to be approached with caution. Recognizing this Court's holding in *Baker v. Carr*, *supra*, that the controversy is "justiciable," there exists no need for the Court to exercise its discretionary equitable powers. The initiative gives the people of Colorado ample means for redress of any apportionment grievance which may arise. They may have that redress on a continuing basis at every biennial general election without any need to turn to the courts. This case presents no need for judicial intervention. It is submitted, therefore, that this Court should withhold the unnecessary exercise of its equitable power.

⁴⁰It might be here noted that another effort was made prior to 1962 to apportion the Colorado Senate on a strict population basis. In 1956 an initiated amendment so to apportion the Senate was defeated by a vote of 349,195 to 158,204. It lost in every county except Denver (App. p. 199).

⁴¹Appellants' brief, pp. 3, 11, 24, 25, 26, 31, 32, 42, 50 and 53.

CONCLUSION

For the foregoing reasons the appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX
COLORADO CONSTITUTIONAL PROVISIONS
CONSTITUTION OF COLORADO
ARTICLE V

Legislative Department

Section 1. General assembly — initiative and referendum.—The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly.

The first power hereby reserved by the people is the initiative, and at least eight per cent. of the legal voters shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, shall be addressed to and filed with the secretary of state at least four months before the election at which they are to be voted upon.

The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety, and appropriations for the support and maintenance of the department of state and state institutions, against any act, section or part of any act of the general assembly, either by a petition signed by five per cent. of the legal voters or by the general assembly. Referendum petitions shall be addressed to and filed with the secretary of state not more than ninety days after the final adjourn-

ment of the session of the general assembly, that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section or part of any act, shall not delay the remainder of the act from becoming operative. The veto power of the governor shall not extend to measures initiated by, or referred to the people. All elections on measures referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the right to enact any measure. The whole number of votes cast for secretary of state at the regular general election last preceding the filing of any petition for the initiative or referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted.

The secretary of state shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance herewith. The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by qualified electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some qualified elector, that each signature thereon is the signature of the person whose name it purports to be, and that to the best of the knowledge and belief of the affiant, each of the persons signing said petition was at the time of signing, a qualified elector. Such petition so verified shall be prima facie evidence that the

signatures thereon are genuine and true and that the persons signing the same are qualified electors. The text of all measures to be submitted shall be published as constitutional amendments are published, and in submitting the same and in all matters pertaining to the form of all petitions the secretary of state and all other officers shall be guided by the general laws, and the act submitting this amendment, until legislation shall be especially provided therefor.

The style of all laws adopted by the people through the initiative shall be, "Be it Enacted by the People of the State of Colorado."

The initiative and referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws, except that cities, towns and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum, nor more than fifteen per cent. to propose any measure by the initiative in any city, town or municipality.

This section of the constitution shall be in all respects self-executing.

As amended November 8, 1910.

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IN THE
**SUPREME COURT
OF THE UNITED STATES**

October Term, 1963

No. 508

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens
of the State of Colorado, taxpayers and electors therein, for
themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLO-
RADO, JOHN LOVE AS GOVERNOR OF THE STATE OF COLO-
RADO, HOMER BEDFORD AS TREASURER OF THE STATE OF
COLORADO, AND BYRON ANDERSON AS SECRETARY OF STATE
OF THE STATE OF COLORADO, EDWIN C. JOHNSON, JOHN C.
VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING and WILBUR
M. ALTER,

Appellees.

BRIEF OF APPELLEE - DEFENDANTS

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Argument:

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VIVIAN, JOSEPH F. LITTLE, WARWICK DOWNING and WILBUR
M. ALTER,

Appellees.

BRIEF OF APPELLEE - DEFENDANTS

The Parties

Appellants herein, Lucas and Lisco, are citizens and
residents of the State of Colorado, residing in the counties
of Adams and Denver thereof, respectively. They were
among the original plaintiffs in the two actions filed and
consolidated for hearing below, numbered 7501 and 7637.

Appellees, The Forty-Fourth General Assembly; John Love, Governor; Homer Bedford, Treasurer; and Byron Anderson, Secretary of State, are the successors in office of those named originally as defendants in the two actions below, and for whom the instant brief is filed.

Appellees, Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing and Wilbur M. Alter were, in the course of the proceedings below, permitted to Intervene by virtue of their interest in and support of an Initiated Constitutional Amendment then pending before the People, since adopted, and the validity of which is before this Court for determination.

OPINIONS BELOW

The opinion of the Three Judge Court, United States District Court for the District of Colorado, is reported at 219 F. Supp. 922. The majority opinion authored by Circuit Judge Breitenstein is set forth in full at page 235 et seq. of the Appendix to the briefs of all Appellees.¹

An earlier decision of the court is reported at 208 F. Supp. 471.

JURISDICTION

The judgment and order was entered below on July 16, 1963. Notice of Appeal was filed August 1, 1963. Probable jurisdiction was thereafter noted, and on January 6, 1964 the Court dispensed with the printing of the record and provided for the filing of briefs and oral argument.

¹Hereinafter referred to as Appendix.

QUESTION PRESENTED

Whether the people of the State of Colorado, in the exercise of their sovereign function of selecting a form of state legislative government to insure representation of the whole, are prohibited by the Constitution of the United States from apportioning the two houses of their legislature one solely upon population and the other upon a reasonable basis determined by relevant factors in addition to population.

CONSTITUTIONAL PROVISION INVOLVED

Article V, sections 45, 46, and 47 of the Constitution of the State of Colorado, as amended 1962, commonly referred to, collectively, as Amendment 7. The Amendment is set forth in full commencing at page 257 of the Appendix.

STATEMENT OF THE CASE

(a) *The pleadings and pre-trial proceedings.*

The consolidated action was commenced by the filing of an original complaint numbered 7501 on March 28, 1962, and an original complaint numbered 7637 on July 9, 1962. Both then challenged the existing apportionment of the state legislature of Colorado, by Constitution called the General Assembly. Issue was joined thereon by the filing of answers denying unconstitutional discriminations.

The matter duly came on for hearing, and on August 10, 1962, the lower court issued a *per curiam* opinion holding that the population statistics presented made out a

prima facie case, but by reason of pending Constitutional amendments to be voted on by the people in the ensuing November elections, continued the matter until after November 15, 1962 for further trial on the merits. *Lisco v. McNichols*, 208 F. Supp. 471.

Following adoption by the people of the Amendment here in question supplemental complaints were filed in both actions challenging the constitutionality of that Amendment. The issue was further joined by the answers of the defendants and Intervenor and the consolidated causes came on for pre-trial hearing February 13, 1963. At that hearing the Court stated the one focal question to be whether the apportionment "is valid under the provisions of the 14th Amendment requiring equal protection." (Appendix, pg. 3)

(b) *Brief Outline of the Evidence.*

Colorado's original constitution provided that its legislative department, the General Assembly, bicameral in nature, was to be made up of a House and a Senate being comprised of 26 and 49 members respectively. Art. V, § 46. The original senatorial and representative districts were also set forth in that Article, sections 48 and 49. Both houses were to be apportioned through the use of a ratio system, i.e., allowing a senator and representative for the first specified thousands of population and an additional senator and representative for each increased specified thousands of people. There have been since statehood nine reapportionments under this system. (Appendix, pg. 61)

The system prevailed until 1962 when the instant

Amendment 7 was initiated by the people and subsequently adopted by them pursuant to Article V, § 1 of the Constitution which reserved unto the people the powers of the initiative and referendum. The number of senators and representatives remained at 100, 35 and 65 respectively from 1891 until 1962.

Amendment 7 was described by the court below.

“ Amendment No. 7 created a General Assembly composed of a Senate of 39 members and a House of Representatives of 65 members. The state is divided into 65 representative districts ‘which shall be as nearly equal in population as may be’ with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which ‘shall be as nearly equal in population as may be.’ Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census.” (219 F. Supp. at 925)

Also at the general election of 1962 was presented another initiated amendment, commonly referred to as Amendment 8. This measure was also described below.

“ The defeated Amendment No. 8 proposed a three-man commission to apportion the legislature periodically. The commission was to have the duty of delineating, revising and adjusting senatorial and representative districts. Its actions were to be reviewed by the Colorado Supreme Court. The districting was

to be on a strict population ratio for both the Senate and the House with limited permissible variations therefrom." (219 F. Supp. at 925)

The people adopted Amendment 7 by a vote of 305,700 for, to 172,725 against. The measure carried in every county of Colorado. Amendment 8 was rejected by a vote of 149,822 for, to 311,749 against. It was rejected in every county of Colorado. (See Exhibit C, Appendix, pg. 229)

The state is divided into four economic regions. See Exhibit D, *Economic Analysis of State Senatorial Districts in Colorado*, Denver Research Institute, University of Denver.² These regions are: (1) western, embracing those counties lying generally west of the continental divide or on the front range of the mountains; (2) eastern, comprising, generally, the plains counties; (3) south central, embracing the counties drained by the Rio Grande, together with Las Animas and Huerfano; and (4) the east slope, that tier of counties to the east of the mountains running, generally, from Larimer and Weld on the north to Pueblo on the south.

The unifying economic characteristics of the Western Region are the basic industries of mining, agriculture (principally livestock growing), tourism and recreation. Approximately two-thirds of its population is rural, i.e., living in communities of less than 2,500 inhabitants or on farms. Accessibility by reason of the widely spread mountainous areas is of paramount importance in determining economic and social relationships in the area.

The Eastern Region forms a part of the Great Plains.

²Exhibit D, hereinafter cited D.R.I., is submitted to the court in original form.

The entire region is dominated by agriculture, principally dry farming, with winter wheat the main crop. Accessibility in the area presents no problem, there being in addition to the highways permitting year around travel, at least one railroad through each county.

There is marked economical distress in the South Central Region. There has been a steady population decrease surpassed by declining employment opportunities. Agriculture is the region's most important industry with the relative importance of mining on the decline by reason of diminishing use of coal. The area is heavily populated by those with Spanish surnames.

The major factor distinguishing the East Slope Region from the other three is rapid growth in population, employment and economic activity. The population is highly urbanized — to the extent of 86.7 percent. Employment has risen 34 percent in the past decade. In addition to manufacturing and heavy industry, services and trade, both retail and wholesale, are of great economic importance in the region.

The population of the state (1960) divided by these four regions is as follows:

East Slope	1,317,519
Western	227,841
Eastern	142,033
South Central	66,554
	<hr/>
	1,753,947

From these regions are carved the senatorial districts. In the East Slope all senatorial districts embrace one

county each, and to each are allotted from one to eight senators under Amendment 7. The total representation in the Senate from this region is 23.

The Western Region, with the exception of Mesa county, is comprised of multiple county districts and has a total of 8 senators. The Eastern Region is made up of five multiple county districts and has a total of 5 senators. The South Central Region is made up of three districts with one senator each.

The senatorial districts within the four regions are described in detail in the D.R.I. study. The districts have in themselves unifying characteristics and, as compared to others, have certain distinguishing characteristics. An outline of these features, supported by the Denver Research study, appears in this brief as Appendix A.

Pursuant to the mandate of Amendment 7 the legislature did by House Bill No. 65, commonly referred to as the Lamb Bill, Session Laws, 1963, pg. 520, reapportion the House on a *per capita* basis. While the validity of this legislation is not before the Court, the fact is that it was accomplished.

The result of the apportionment under Amendment 7 is shown by all the evidence to secure representation to all the people. Nevertheless in terms of numbers it leaves control of the legislature in the majority, i.e., the populace of the metropolitan areas. The development of these matters is best left for argument hereinafter and their inclusion at this juncture would result only in undue repetition and argument where argument, as we see it, does not belong.

(c) *The Opinion and Decision Below.*

Upon consideration of all the evidence the decision entered below, Circuit Judge Breitenstein authoring the opinion, and Chief District Judge Arraj concurring. A dissenting opinion was filed by District Judge Doyle.

The decision of the Court was that the apportionment effected by Amendment 7 was not in anywise violative of the Equal Protection Clause of the Fourteenth Amendment. In reaching this conclusion the court recognized that the state is neither an economically or geographically homogenous unit; that one House of the legislature is apportioned *per capita*; that the peoples living within the four economic regions have interests unifying themselves and differing from those in the other regions; that in forming the senatorial districts geographical divisions, accessibility, homogeneity and population have been recognized; that the people of the state overwhelmingly chose the present plan of apportionment, and overwhelmingly rejected a *per capita* method of apportionment, and that by no method of senatorial districting other than that chosen by the people would the minorities be afforded representation.

The evidence, we submit, supports the reasoning, and the reasoning demands the conclusion reached.

SUMMARY OF THE ARGUMENT

I.

The one issue now to be resolved by this Court is whether as determined below, the people of the State of Colorado acted within the confines of the Equal Protection Clause of the Fourteenth Amendment in initiating and adopting a Constitutional Amendment apportioning their bicameral legislature one house strictly *per capita* and the other upon a reasonable basis determined by relevant factors in addition to population.

The determination of that question does not depend upon any conclusion which might be reached in the state legislature apportionment cases now pending before this Court. In none of them is presented the issue here involved wherein one house of a legislature is apportioned strictly *per capita*, and where the plan of apportionment came about through the overwhelming mandate of the people in the exercise of the Initiative, a power reserved unto them by the Constitution.

The question presented is not determined by the decisions of this Court in *Gray v. Sanders*, 372 U.S. 368 and *Wesberry v. Sanders*, No. 22, This Term. The Justices in *Gray* carefully pointed out that it is not to be considered determinative of state legislative reapportionment cases, and *Wesberry* was determined by history applicable to a constitutional provision not here involved.

Two other matters should at the outset be disposed of as being beside the one point involved: The validity of the legislation implementing Amendment 7, which has never been considered, and *Lisco v. McNichols*, 208 F.

Supp. 471, decided below prior to the adoption of Amendment 7.

II.

The Equal Protection Clause of the Fourteenth Amendment does not require a *per capita* apportionment in both houses of a state bicameral legislature.

It was said in *Baker v. Carr*, 369 U.S. 186, 226 that the well developed and familiar standards of Equal Protection do apply — and those standards do not require universal equality. Moreover, the consensus of the state and lower federal court decisions is that practical equality is not required.

Finally there is no historical basis upon which a *per capita* theory could rest. The Founding Fathers, whatever analogy there may be between the governments of the various states and of the United States, determined that the application of the theory was not essential to the government of the United States, and the history of state governments at the time and subsequent to the adoption of the Fourteenth Amendment clearly evince that Equal Protection of the Laws was not meant to require *per capita* apportionment of state legislatures.

III.

The plan of apportionment initiated and overwhelmingly adopted by the people of Colorado meet the well defined and familiar standards of Equal Protection. Those standards or tests were succinctly stated by Justice Brandeis in his opinion to *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406. Applied to the question at bar, they are:

First: The object of Amendment 7 accomplishes a purpose and promotes a policy within the permissible function of the state.

The permissible function involved here is a bicameral legislative department. The objects and purposes of bicameralism are two-fold, one, to effect a check and balance in the legislature, and two, to secure a representation therein of all the peoples, i.e., the whole, and not merely the majority.

Amendment 7 does accomplish these purposes. Clearly it retains a check and balance. It also provides a representation of the whole, for by the apportionment method of the Senate minority peoples and their interests are given a voice in the legislature. As determined by the court below, that minority under a strict *per capita* system in both houses would be in fact overwhelmed.

Second: The apportionment plan of Amendment 7 bears a substantial relation to the object sought.

In consideration of the first test it becomes clear that the Colorado apportionment plan serves to give the minority peoples and interests a voice in the legislature.

Yet it is equally clear that this object is not perverted by giving to the minorities the control of the legislature. The terms "majority" and "minority" when applied to the question of reapportionment, and as applied by those who challenge Amendment 7, mean those living in the metropolitan areas and those living in the rural areas, respectively. It is not just a simple question of residence, i.e., of metropolitan peoples vs rural peoples. Obviously those living in the two areas have vastly different prob-

lems to be considered in the legislature, and the differences between them exist accordingly.

The apportionment plan of Amendment 7 leaves the majority vote in the legislature in the highly populated, metropolitan areas.

There is no "perpetual veto" or "perpetual discrimination" as there is in fact no veto or discrimination, and by reason of the Initiative, there is no perpetual form of legislative government.

Third: The apportionment plan of Amendment 7 treats alike those similar in fact.

There is under Amendment 7 a complete lack of a "crazy-quilt" apportionment, or otherwise stated, there is a definite, continuing policy.

A consideration of the apportionment plan unquestionably shows that those living in the rural areas, with interests connected with agriculture, mining and the like, are not discriminated against by others similarly situate, and in like fashion, are those in the heavily populated areas treated alike.

ARGUMENT

I.

The one issue now before the Court cannot be resolved by decision in the pending state legislative reapportionment cases from Virginia, Alabama, Maryland, Delaware and New York, nor are the decisions of this Court in *Gray v. Sanders* and *Wesberry v. Sanders* dispositive of the issue presented.

We believe it would be well to state what in our view is the one question now before this Court; and to emphasize that which is before the Court may be best accomplished by disposing at the outset of that which is not.

The question to be determined may be simply put: Are the people of the State of Colorado, in the exercise of their sovereign function of selecting a form of state legislative government to insure representation of the whole, prohibited by the Constitution of the United States from apportioning the two houses of their legislature one solely upon population and the other upon a reasonable basis determined by relevant factors in addition to population?

The answer to the question, which we would respectfully submit to be self evident, does not require either that a position be taken on other state apportionment cases now pending before the Court or that a sophisticated argument be made distinguishing the two Georgia decisions rendered since *Baker vs. Carr*, 369 U.S. 186.

(a) *The questions before this Court presented by the apportionments of Virginia, Alabama, Maryland, Delaware and New York.*

We are, of course, indebted to those who have appeared in the cases now pending for the collective presentation of basic principle. Because of their efforts much which could ordinarily and of necessity be required herein would only be repetitious. The factual premise upon which basic principle must operate in each of those matters, however, clearly renders each inapposite to the case at bar.

The apportionment questions presented by *Davis v. Mann*, Oct. Term 1963, No. 69, 213 F. Supp. 577; *Reynolds v. Sims*, Oct. Term 1963, Nos. 23, 27, 41, 208 F. Supp. 431; *Maryland Committee for Fair Representation v. Tawes*, Act. Term 1963, No. 29, 184 A.2d 715; *Roman v. Sincock*, Oct. Term 1963, No. 307, 215 F. Supp. 169; and *W.M.C.A. v. Simon*, Oct. Term 1963, No. 20, 208 F. Supp. 368, all involve situations wherein considerable differences in representation on a pure population basis exist in both houses of the state legislatures. In Colorado the House by Amendment 7 is apportioned strictly *per capita*.

Also, a principal distinction between the case at bar and the remaining cases pending is that in Colorado, as has heretofore been pointed up, the present plan of apportionment was initiated and adopted by an overwhelming vote of the people, the same receiving an affirmative plurality in every single one of Colorado's sixty-three counties.

We make plain that reference to the foregoing is not and should not be taken to mean that unconstitutionality

of the apportionment laws in these other cases must inevitably follow. Full consideration must of course be given to whether or not the Fourteenth Amendment requires their justification and, if so, whether there are or are not present in each instance factors of justification.

Nor should the recital be taken as an expression of opinion that the Fourteenth Amendment requires a *per capita* apportionment in *one* house of a bicameral legislature.

There are of course other and quite substantial existent differences. Those differences need not be pointed up in detail at this juncture for, in discussing hereafter Colorado's history, its peoples, its economy, its geography and other characteristics, solely peculiar to it, the differences will become evident.

(b) *Gray v. Sanders and Wesberry v. Sanders.*

We would further submit that *Gray v. Sanders*, 372 U.S. 368 and *Wesberry v. Sanders*, No. 22, Oct. Term 1963, are of no greater import to the resolution of the instant cause. We take the words of the Justices in *Gray* to mean precisely what they say.

Justice Douglas for the majority:

"This case, unlike *Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S.Ct. 691, *supra*, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives." (372 U.S. at 376)

Justice Stewart, with whom joined Justice Clark, concurring:

"This case does not involve the validity of a state's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, *nor any of the problems under the Equal Protection Clause which such litigation would present.* We do not deal here with 'the basic ground rules implementing *Baker v. Carr.*'" (372 U.S. at 381-382)

Apart from the carefully described limitations of *Gray*, its inapplicability is patent. We do not deal here with provisions rendering unto each of the Colorado voters resident in Hinsdale, Huerfano or Baca counties two, four or six votes for one seeking to become Governor while their fellow citizens happening to reside in Jefferson or Arapahoe county may cast for their gubernatorial choice only one.

And if we read *Wesberry v. Sanders* correctly its holding flows from the intent of those framing Art. I, § 2 of the Constitution that it should mean "one man's vote in a congressional election is worth as much as another's." Explicitly noted was that the questions of Due Process, Equal Protection and Privileges and Immunities arising under the Fourteenth Amendment were neither considered nor determined.

We do not perceive that the Framers' intentions of 1787 with respect to that Article which wrote the *Great Compromise* into the Constitution can be equated with the intentions of their successors promulgating nearly a century later the Equal Protection Clause.

(c) *The Lamb Bill, legislative implementation of Amendment 7.*

At this juncture it might also be well to point up that it is Amendment 7 which is involved here and no question arises with respect to the implementing legislation.

It will be noted that Section 46, Article V of the Constitution, as now amended, provides that the state shall be divided into 65 representative districts "which shall be as nearly equal in population as may be"; Section 47 provides that the State "shall be divided into 39 senatorial districts. . . . Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be."

House Bill No. 65, Forty Fourth General Assembly, Session Laws 1963, pg. 520, commonly referred to as the Lamb Bill, divided the state into House and Senate districts as provided by the Constitutional Amendment.

The validity of this legislation has never been considered or challenged in these proceedings. The court below stated "No question is raised concerning the implementing legislation." (219 F. Supp. at 925)

We do not understand that Appellants before this Court challenge this legislation in any regard. The results expressed in terms of population are reflected in Appendix B, pg. 75 et seq. to Appellant's brief and examination of the data evidences only the legislature's good faith in carrying out the people's mandate.

(d) *Lisco v. McNichols*, 208 F. Supp. 471.

Finally in this regard we would put to rest all that is or may be claimed by virtue of *Lisco v. McNichols*, 208 F. Supp. 471. That decision, wherein the court below found

a *prima facie* case of invidious discrimination, was rendered prior to the passage of Amendment 7. It was premised upon statistical data showing, in certain cases, extreme disproportion. For example, it was found one representative district had some 7,000 people represented by a single House member as contrasted to another district with two representatives for some 127,000 persons.

Surely it must be conceded by all that in determining the constitutionality of bicameral apportionment both houses must be considered and a decision of validity or invalidity reached only after consideration of the whole. Because invalidity was determined prior to the drastic reapportionment of one house the decision is now wholly without persuasive force. The court below deemed it so for reasons so obvious their statement is superfluous.

II.

The Equal Protection Clause of the Fourteenth Amendment does not require a per capita apportionment in both houses of a state bicameral legislature.

The entire argument made by Appellants, if we understand it correctly, is that the Fourteenth Amendment requires both houses of bicameral state legislatures to be apportioned, strictly *per capita*, or to put it otherwise, Equal Protection of the Laws demands universal equality. The argument is patently unsound.

This Court in *Baker*, answering that justiciability is not affected by judicial abstention from political questions, stated,

... Nor need the appellants, in order to succeed in

this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." (369 U.S. at 226).

The judicial standards, well developed and familiar, are simply and cogently put by Justice Brandeis in dissent to *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406.

"* * * In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming/specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one, which is speculative, remote or negligible."

To argue that state legislative apportionment compliant with Equal Protection means only *per capita* apportionment is to argue for the discard of the "well developed and familiar standards"; it is to argue that the standard is rather "universal equality", an assertion Justice Douglas concurring in *Baker*, emphatically denied. (369 U.S. at 244-245) Moreover it has been observed with clarity unusual to the complexities of the issue that

if complete or primary emphasis is placed upon universal equality of representation the reasoning must be found in the Guaranty Clause, not in Equal Protection of the Laws. See Israel, *The Future of Baker v. Carr*, Mich. L.R. 61: 107. In *Baker*, however, it was again affirmed that the issue of republican form of government was one without the judicial ambit.

In promulgating the standards of Equal Protection the decisions of this Court lend no aid to the proposition of strict *per capita* apportionment of state legislatures. Where or what else may be turned to for support? Certainly the consensus of the lower courts gives no aid. As stated by Judge Breitenstein below,

“A heavy majority of the state and lower federal courts has declined to accept the ‘practical equality standard’ as a requirement inherent in the Equal Protection Clause.” (219 F. Supp. at 927)

The many decisions supporting the statement are collected by the Circuit Judge in his note thereto.

Of equal certainty is the absence of historical support. The comments of the Founding Fathers are set forth at great length in the briefs and appendices thereto in *Maryland Committee for Fair Representation v. Tawes*, supra. While we are unable to precisely determine any overriding value in the philosophy of those who lived and died long before adoption of the Fourteenth Amendment, nevertheless nothing in anywise indicates a consensus there on the necessities and values of a legislative body chosen strictly *per capita*. As a matter of fact, and apart from the presence or lack of analogy to state government, the Founding Fathers determined in the un-

doubted exercise of good conscience and sincere belief in exemplary and lasting republican government that *per capita* apportionment of the entire legislative branch was not necessary.

Justice Frankfurter's opinion in *Baker*, 369 U.S., 311-317, points up the apportionment of the legislatures in the various states at the time the Fourteenth Amendment was ratified, and further the legislative apportionment in the states admitted thereafter and under its mandate. The statement there made cannot be improved upon and need not be repeated; suffice it to say that no comfort for the exponents of pure *per capita* can be derived from this history.

III.

The plan of apportionment initiated and overwhelmingly adopted by the people of Colorado meets the well defined and familiar standards of Equal Protection of the Laws.

Notwithstanding the fact that the case of those seeking this review, as stated by them, must fall with the ill-conceived notion of strict *per capita* apportionment, it nevertheless is necessary to set forth that which, as applied to the apportionment of the Colorado General Assembly, falls within the allowances of Equal Protection of the Laws. It is unnecessary and would be inappropriate to go beyond that which is here actually involved.

To determine that which is allowable we return to the "well defined and familiar" standards of Equal Protection succinctly stated by Justice Brandeis.

First: The object of Amendment 7 accomplishes a purpose and promotes a policy within the permissible function of a state.

The permissible function of government involved is a bicameral legislature. Bicameralism has always been and will, we suppose, long remain the most prevalent of our state legislative systems. It was, as has been frequently pointed up to the Court, the legislative form chosen by nearly all states and retained by all with the exception of Nebraska. No one would or could seriously maintain that bicameralism is rendered impermissible by the Equal Protection Clause.

Bicameralism has, in Colorado and undoubtedly elsewhere, two principal objects or purposes: one, to effect a check and balance, and two, to insure the representation of the whole rather than only the majority.

This form of legislative government was written into the first Colorado Constitution, 1876, Article V, Section 1, providing for a General Assembly consisting of a senate and house of representatives.

The original section 46 of Article V provided,

“The senate shall consist of twenty-six and the house of representatives of forty-nine members, which number shall not be increased until the year of our Lord one thousand eight hundred and ninety, after which time the general assembly may increase the number of senators and representatives, preserving as near as may be the present proportion as to the number in each house; provided, that the aggregate number

of senators and representatives shall never exceed one hundred."

The total number was increased by Colorado Session Laws, 1891, pg. 22, to 100, 35 senators and 65 representatives. From 1891 until passage of the subject amendment the total number in the legislature and the number in each house thereof remained constant.

Section 3, Article V, unchanged since statehood, provides that the term of Senators shall be four years³ and the term for house members two years. Section 11, Article V provides that a majority of each house shall constitute a quorum. Section 22 of the article provides that to become law a bill shall have the vote of a majority "of all members elected to each house taken on two separate days in each house."

Thus the Framers of the State Constitution established a two-fold policy of the numerical membership of the Assembly: First, that the total number of both houses should not become unduly cumbersome. In nearly three quarters of a century the total has risen only four, from 100 to 104. It is readily apparent that a state legislature can become so large as to become unduly cumbersome causing effective debate and consideration, and hence effective legislation to become impracticable if not impossible. Cf. *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368, 379.

Second, the ratio of members of one house to the other should remain constant. From 1891 - 1962 the ratio was 5 - 9, under Amendment 7 it was slightly modified to 3 - 5.

³With the exception of one-half of those elected to the first session under the Constitution, whose term was for two years. Art. V, Sec. 5.

That the two houses were to serve as a check and balance one upon the other is of course evident in the requirement that legislation must pass the majority of both. In addition, that the two houses should be differently constituted to this end is made clear not only by the preservation of the numerical ratio one to the other, but also by the fact that the terms of office have always been of two years in the House and four in the Senate. It would be clearly inappropriate to suggest that it was ever intended that the General Assembly was to become a homogeneous body made up of two houses different only in name.

It is also quite evident from the mandate of the 1876 Constitution and the ensuing practice thereunder that the General Assembly was to represent not only the majority, but the whole of the people of Colorado.

Much has been said concerning population being the historical *basis* of apportionment. The Appellants' argument runs that because population has been the basis, *per capita* apportionment is an historical truism. The argument made is devoid of merit; but from its premise, i.e., the state's historic apportionment, inescapably flows the conclusion that all the people of Colorado were to be represented in the Assembly.

The people of Colorado declared in their Bill of Rights, Article II, Constitution,

"In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare;

"Section 1. All political power is vested in and derived from the people; all government, of right, origi-

nates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

The powers of the government therein spoken of to be instituted "solely for the good of the whole" were divided by Article III between three distinct departments, one being the legislative. We take these provisions to indisputably mean that the legislative branch, that is the General Assembly, was intended to represent the whole.

Even in the absence of such an express declaration of the people it could not be said that the function of the legislature was otherwise, for to represent the people is to represent all of the people. Stated by Chief Justice Campbell in dissent to *People v. Sohrs*, 31 Colo. 369, 438, 74 Pac. 167,

"* * * No one is so rash as to deny that in this country a majority, in general, rules. But why is this so? As well said by Judge Jameson at section 568 of his valuable work on Constitutional Conventions, in the true sense of the term 'the people' means the political society considered as a unit, comprising the entire population, of all ages, sexes and conditions. * * *"

To represent the whole, and not the majority alone, the original system of apportionment was devised. Article V, Sections 48 and 49 set forth the first senatorial and representative districts. Section 47 provided for their alteration from time to time but provided also that no county shall be divided in the formation of a district and that multiple districts shall be contiguous and compact. Section 45 set forth that following the censuses the legislature "shall revise and adjust the apportionment

for senators and representatives, on the basis of such enumeration *according to ratios to be fixed by law.*"

By these ratios a senator and representative were allowed for the first specified thousands of population in the district, and a second or additional senator and representative for each specified thousands of additional persons or fraction thereof. The legislative history gleaned from the yearly Session Laws in this regard is illustrated in the following table.

SENATE

Year	Number of Persons	Additional Senator for Additional Persons	Fraction
1881	5,000	9,000	7,000
1891	8,000	20,000	15,000
1901	10,000	20,000	15,000
1933	17,000	35,000	32,000
1953	19,000	50,000	48,000

HOUSE

1881	1,000	5,000	3,000
1891	3,000	10,000	8,000
1901	2,000	15,000	12,000
1933	8,000	19,000	17,000
1953	8,000	22,500	22,400

Obviously the utilization of the ratio system constitutes what might be said to be an equalizer between the populous and less populous areas, in other words, insuring the less populated areas a voice in government.

The peculiarities of Colorado's topography, unequalled elsewhere in the Union, has never of course ad-

mitted or permitted of an equal distribution of population to area or of population to economic interest.

Whether or not in the utilization of this system the justifiable object of representing the whole was perverted through resulting undue representation of the non-majority is a matter not before the Court. It was presented in *Lisco v. McNichols*, 208 F. Supp. 471, and has, since the adoption of Amendment 7, passed into history.

The important fact, to be dealt with in the present context, is that the people of Colorado established a bicameral system of legislative government, a prime purpose and object of which was to secure representation of all the people. In accord therewith was Amendment 7 written into the Constitution by the people. Do then the provisions of Amendment 7 accomplish that purpose?

The House is of course put upon the basis of population, solely. It is apportioned *per capita*, and the majority rules supreme, untempered, in that body.

Through the representation in the Senate, however, the Assembly is itself made representative of the whole. For here consideration is given to the factors of economics, geography and demography peculiar to the State of Colorado, and in such consideration is found the representation of minority interests found only in sparsely populated areas.

The court below discussed the peculiarities of Colorado's topography at 928-929 of 219 F. Supp.

"Colorado has an area of 104,247 square miles which is almost equally divided between high plains in the

east and rugged mountains in the west. It has an average altitude of 6,800 feet above sea level and some 1,500 peaks which rise to 10,000 feet or more. The Continental Divide crosses the state in a meandering line from north to south.

In the eastern half of the state are high plains crossed by two major river systems, the South Platte and the Arkansas. The western half is a mountainous area drained principally by the Rio Grande and by the Colorado River and its tributaries. Major mountain ranges lie east of the Continental Divide in some sections of the state and have foothill areas of varying breadth separating the high peaks from the high plains.

Geographically the state is divided into many regions with transportation difficulties of varying severity. The high plains are crossed from east to west by several railroads and main highways. The only north to south rail system and main highway system in this area lie just east of the foothills. The western part of the state is separated into many segments by mountain ranges and deep canyons. One main-line railroad crosses this section from east to west and none from north to south. Four principal highways provide east to west transportation by crossing the ranges at passes having altitudes of 9,000 to 12,000 feet. The north to south highways are less adequate and follow indirect routes. The terrain of the western section is such that some communities only a few miles apart on the map are many miles apart by the shortest useable road. Commercial air transportation between other than the metropolitan centers is limited.

Colorado is further divided by the availability of water supply. The state is largely semi-arid with only isolated mountain areas having an annual precipitation of over 20 inches. That part of Colorado west of the Continental Divide has 37% of the total state land area and 69% of the state's surface water yield. The part east of the Continental Divide has 63% of the land area and 31% of the surface water supplies. Conflicts over the use of water have troubled the state continuously since its admission to the Union. The growth of the metropolitan areas would have been impossible without the transmountain diversion of water from the Colorado River and its tributaries. The divisive nature of the "problem and the need for a state-wide water policy resulted in the creation of the Colorado Water Conservation Board, the members of which are chosen geographically by drainage basins. This recognition of the diverse interests of the competing areas has enabled Colorado to develop impressive irrigation and hydroelectric power projects.

The 1960 Federal Census gave Colorado a population of 1,753,947 persons. The population is concentrated heavily along the eastern edge of the foothills from Fort Collins on the north to Pueblo on the south. In this relatively narrow strip are located three Standard Metropolitan Statistical Areas as defined by the Census Bureau.

The metropolitan areas and their populations are: Denver (Adams, Arapahoe, Boulder, Denver and Jefferson Counties; — 929,383; Colorado Springs (El Paso County). — 143,742; Pueblo (Pueblo County) — 118,707."

Submitted together with the Appellees' briefs is a

document entitled *Economic Analysis of State Senatorial Districts in Colorado*. The report was prepared by the Denver Research Institute, University of Denver. The document was intended to be and remains unchallenged as an objective study to determine the distinguishing economic, socio-economic and geographical characteristics of the senatorial districts.

The court below also referred to this study in the following manner,

“Expert research economists testifying for the defendants divided the state into four regions, Western, Eastern, South Central and East Slope. The Western Region includes those counties west of the Continental Divide and those east of the Divide and entirely within the Front Range of mountains. The area is largely mountainous with wide fluctuations in elevation, precipitation and temperature. About two-thirds of the population live in communities of less than 2,500 inhabitants or on farms. Over 65% of the area is in some form of government ownership. The major industries are agriculture (principally livestock raising), mining, and tourism.

The Eastern Region is a part of the Great Plains. The area is dominated by agriculture with winter wheat the principal crop. Irrigation in the South Platte and Arkansas Valleys produces specialized crops. Livestock raising and feeding are important activities. There is some oil production.

The South Central Region includes Huerfano and Las Animas Counties and the six counties drained by the Rio Grande. Agriculture (principally potato rais-

ing and livestock) and coal mining are the main industries.

The East Slope Region includes the strip of counties from Larimer and Weld on the north through Pueblo on the south. The population is highly urbanized with 86.7% living in urban areas. The economy is diversified with manufacturing, agricultural production, mining, tourism and trade and services contributing to the wealth of the area." (219 E. Supp. 929-930).

We have also included herein as Appendix A, some of the factors, taken from the study, reflecting the distinguishing features of the senatorial districts, one from the other, and in the multiple county districts, the unifying similarities.

What becomes patently clear from an examination of the Denver Research study and consideration of the geography of Colorado precluding an even distribution of population throughout, is that Amendment 7 does in fact give to all the people due representation in their State legislature.

Judge Breitenstein concluded,

"The heterogenous characteristics of Colorado justify geographic districting for the election of the members of one chamber of the legislature. In no other way may representation be afforded to insular minorities. Without such districting the metropolitan areas could theoretically, and no doubt practically, dominate both chambers of the legislature." (219 F. Supp. at 932).

The conclusion is not only supported throughout by the instant record, but is perhaps most easily illustrated by pointing up just a few examples contained in Appellants' suggested *per capita* apportionment, Appendix C, pg. 93 et seq. to their brief.

(a) Therein Pueblo is joined with Crowley and Otero. The two latter counties, represented in the Senate first as one county and then as two since 1881, would obviously no longer be represented. The population of Pueblo, highly urbanized, is shown as 118,707: the combined population of Crowley and Otero with interests in no wise similar to Pueblo, 28,106.

(b) To the same end would Elbert county with a population, 1960, of 3,708, and presently joined with Cheyenne, Kiowa, Kit Carson and Lincoln in one of the most homogenous and agriculturally dominated senatorial districts in the state, be joined with Arapahoe County, highly urbanized (91%) with a population of 127,520.

(c) Weld County, a senatorial district since 1891, the third largest Colorado county with a population of 72,344, half of which or roughly 36,000 reside in its southwest corner (26,000 in the city of Greeley), is to be joined with counties to the northeast, Logan, Sedgwick and Phillips, with a combined population of 28,984.

(d) The senatorial district of Delta, Gunnison, and Hinsdale counties would be joined with another embracing Montrose, Ouray, San Miguel and Dolores into a single member district. With even the vaguest notion of Colorado geography one could not seriously contend that a single senator could effectively and personally represent

the peoples of this area. There is virtually no movement east to west in this mountainous country. Gunnison and Hinsdale counties are topographically as far removed from San Miguel and Dolores as were they counties on the eastern slope of Colorado.

(e) Perhaps conceivably worse is the suggested joiner into a single member district of the counties embracing all of Southwestern Colorado; i.e., Districts 31 and 35 would be joined.⁴ Economists placed District 31, Saguache, Mineral, Rio Grande and Conejos in the South Central Region, and District 35, San Juan, Montezuma, La Plata and Archuleta counties in the Western Region. All counties in District 31 fall within the upper Rio Grande Basin. Its boundaries to the west and north are defined by high mountain ranges. 38% of its residents are people with Spanish surnames. Its population is nearly 7-1 rural. (D.R.I. II-1). It is losing in population. (17% in 10 years).

On the other hand district 35 is wholly separated from district 31 topographically. It has gained population in the last ten years 25%, and its population between urban and rural is nearly equal.

(f) So also are joined all counties of northwestern Colorado into one huge single member district. We would ask how one senator could possibly represent with any effect the peoples of Moffatt, Rio Blanco, Routt, Jackson, Grand, Garfield, Eagle, Pitkin, Summit and Lake Counties. The area extends east and west from the middle

⁴It should be noted that the Senatorial district numbers are not the same in the D.R.I. study and as set forth by the court below, although the districts are, of course, the same. The court uses the numbering system of the Lamb Bill and reference herein to the districts will be in the same manner.

of the state to the western border, and again north and south from the middle of the state to the northern border. The area exceeds 20,000 square miles, and the average population per square mile of all its counties is 3. Since 1881 the whole area has comprised at least two senatorial districts. It is folly to suppose that the peoples in all areas of this vastness could speak through one senator. (Reference for the above may be made to Part II, D.R.I., particularly pages 1-4; 9-12; 18-25).

Appellants do not claim their suggested *per capita* apportionment reaches perfection. We would suppose however some thought has been given to it. The fact is the results flowing therefrom in consideration of all the peoples of Colorado would be disastrous. Whatever has passed since *MacDougall v. Green*, 335 U.S. 281, has nevertheless left undiminished the cogency of Justice Frankfurter's comment that

"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government." (335 U.S. 283).

We would respectfully suggest that the Fourteenth Amendment does not render necessary the arithmetical transformation of sound government to the unsound. That in a word is what Appellants would have this Court do.

Second: The apportionment plan of Amendment 7 bears a substantial relation to the object sought.

The second standard under which validity is to be tested by the Equal Protection Clause has, in a large measure, been considered above. The provisions of Amendment 7 do bear a substantial relation to the objects and purposes of bicameralism.

We assume that what is implicit if not explicit in *Baker* is that population must be, under Equal Protection of the Laws, considered in the apportionment of state legislatures. Putting it another way, majorities must be considered. Hence in determining whether "differences" bear a substantial relation to the object, "differences" must mean in the apportionment sense, differences in population.

Thus while the minority and their interests are entitled to representation in the legislature, this object would be perverted were the minority permitted to override the majority, i.e., were they given effectual control of the legislature. Then the apportionment would bear no substantial relation to the object, and to employ the vernacular used, the apportionment would become invidious.

Applying the test is not completely free from difficulty for majority and minority interests are not in all cases well defined. Unquestionably at times majority interests are embraced within those of the minority and vice versa.

The theoretical difficulties however are in a large measure, if not completely, removed when consideration of the problem is placed in the context in which it arose. The whole reapportionment problem arose and is with us throughout the United States because of the growth of urban and suburban areas. The brief of Appellants makes clear throughout that what is complained of is imagined

discrimination against the populous areas in favor of the rural areas.³

Adopting the definitions of majority and minority interests used by Appellants and to our knowledge by all others claiming to be discriminated against in kindred causes, the unquestioned statistics of the Colorado populace renders the cry of invidious discrimination a shibboleth.

In the division of Colorado into four regions the Denver Research Institute characterized the East Slope as follows:

"The major factor which differentiates the East Slope Region from the other three regions of Colorado

³So it is said therein, pg. 60.

"That discrimination is, however, euphemistically worded, directed against suburban and urban centers and in favor of rural areas."

And at page 39-40,

"If 'rural America' no longer typifies the United States, and most clearly it does not, then conversely the problems of the United States and of most of its states are primarily metropolitan problems, and those who must cope with such problems must be representative of the population, predominantly metropolitan in its locus and approach. The thesis that dominance must continue from the former great mining areas, from the cattle regions of the plains and the market town in the counties, is a thesis which, emotionally appealing though it may be to some, we respectfully submit is without maintainable constitutional foundation."

Again at page 36,

" * * * Impetus has been given the process by the massing of population in large urban centers, by constant decrease in the importance of the rural areas of the United States in point of population, while those same areas remain politically dominant in state legislative bodies by reason of perpetuated representation out of proportion to present populations."

is rapid growth—growth in terms of population, employment, and economic activity. The population increased by 48 percent between 1950 and 1960, as compared to a net decrease for the other three regions of the state combined. The population in the East Slope Region was 1,317,519 in 1960, or 75.1 percent of the state's total. The population is also highly urbanized, with 86.1 percent of the people in the East Slope Region living in urban areas and only 13.2 percent living in rural areas (see Table 1). Population density in the East Slope Region is 88.7 persons per square mile as compared to about 5 persons per square mile in the other three economic regions.” (D.R.I. I, 11-13).

The following table is illustrative.

County	1960 Population	Number of Senators Amendment 7
Larimer	53,343	1
Weld	72,344	2
Denver	493,887	8
Adams	120,296	2
Arapahoe	113,426	2
Jefferson	127,520	2
Boulder	74,254	2
El Paso	143,742	2
Pueblo	118,707	2
Total	1,317,519	23

It is readily observed that the densely populated areas of Colorado do in fact have a majority in the Senate, and of course a greater majority in the House consonant with the area's population. The area on strict *per capita* is entitled to 48 members of the total 65 in the House.⁶

Two counties, Larimer and Weld, may be taken from the totals as not by all considered part of the heavy metropolitan Denver, Pueblo and Colorado Springs areas, and a majority nevertheless remains for the metropolitan areas in the General Assembly.

Another method might be to take those counties which are, so it is said, discriminated against as the Senators therein represent a lesser number of people than the figure derived in dividing the total population by the total number of senators, i.e., 44,973.

County	Population	Number of Senators Amendment 7
Larimer	53,343	1
Denver	493,887	8
Adams	120,296	2
Arapahoe	113,426	2
Jefferson	127,520	2
El Paso	143,742	2
Pueblo	118,707	2
Mesa	50,715	1
Totals	1,221,636	20

Here again a majority exists.

⁶Under the Lamb bill, implementing Amendment 7 on *per capita*, as near as may be, the area is given 47.

Another method might be to take those districts predominantly rural.

District	Counties Included	Total Population	Number of Senators under Amendment 7
31	Conejos, Mineral, Rio Grande, Saguache	24,485	1
15-16	Weld	72,344	2
24	Chaffee, Clear Creek, Douglas, Gilpin, Park, Teller	20,909	1
27	Delta, Gunnison, Hinsdale	21,287	1
29	Grand, Jackson, Moffatt, Rio Blanco, Routt	23,426	1
32	Mesa	50,715	1
33	Dolores, Montrose, Ouray, San Miguel	25,027	1
35	Archuleta, La Plata, Montezuma, San Juan	36,727	1
37	Eagle, Garfield, Lake, Pitkin, Summit	28,249	1
28	Logan, Phillips, Sedgwick	28,294	1
34	Cheyenne, Elbert, Kiowa, Kit Carson, Lincoln	21,189	1
36	Morgan, Washington, Yuma	36,729	1
38	Crowley, Otero	28,106	1
39	Baca, Bent, Prowers	27,025	1
Totals		444,512	15

The division of the total senatorial representation in

each district by the total rural and urban population there-
of also clearly evinces that the rural interests are in the
minority.

District	Urban Population	Rural Population	Number of Senators Under Amend- ment 7
23	.536	.464	1
30	.511	.489	1
31 South Central	.138 (1.185)	.862 (1.815)	1
1-8	8.000		8
9-10	1.742	.258	2
11-12	1.518	.482	2
13-14	1.518	.482	2
15-16	.728	1.272	2
21-22	1.678	.322	2
26	.652	.348	1
19-20	1.834	.166	2
17-18 Eastern Slope	1.762 (19.432)	.238 (3.568)	2
24	.219	.781	1
25	.549	.451	1
27	.343	.657	1
29	.171	.829	1
32	.534	.466	1
33	.201	.799	1
35	.472	.528	1
37 Western Slope	.276 (2.765)	.724 (5.235)	1
28	.371	.629	1
34		1.000	1
36	.299	.701	1
38	.461	.539	1
39 Eastern	.308 (1.529)	.602 (3.471)	1
	24.911	14.089	39

Another method might be to utilize the ratio of the House to the Senate and determine the relative representation in the entire General Assembly. The ratio (39-65) is 3-5. Considering the total number in the House (65) there are therein 195 units (3 x 65). There would be a like number of units in the Senate (5 x 39), or a total in the Assembly of 390. The following table illustrates the total Assembly representation of the populous areas through the employment of such a unit device.

County	House Unit	Senate Unit	Total
Larimer	6	5	11
Weld	9	10	19
Boulder	9	10	19
Adams	12	10	22
Arapahoe	12	10	22
Jefferson	12	10	22
Denver	54	40	94
El Paso	15	10	25
Pueblo	12	10	22
Total	141	115	256

The populous areas are represented in the Assembly in a ratio of 256 to 390, or approximately 2/3 of the entire. Again if Weld and Larimer be removed, 30 units, there still remains 226 units out of the total of 390.

Presumably there are other methods of illustrating that shown by the foregoing. Any method used would reflect, however, that the heavily populated urban areas of Colorado have a majority in the General Assembly.

¹Representation in the House is taken from the Lamb Bill, see Appendix B, Appellant's Brief, pgs. 75 to 78. The population figures for the tables set forth hereinabove are found in the D.R.I. II, 1-4.

The phrase "perpetual veto", meaning we suppose that the rural can veto legislation desirable to the urban, has an apparent attraction to Appellants. The phrase is employed throughout their brief. It is an argument, no matter how high sounding, without foundation. Nothing more need be added to that shown above to establish, in fact, there is no veto.

Any argument of "perpetuity" is of equal speciousness. Article V, Section 1, Colorado Constitution, reserves unto the people the power of the initiative and referendum. There is no point in extended argument as to the practicabilities of the initiative or the ease of its accomplishment. No better example of the facility of the initiative than Amendment 7 itself exists.

The want of equity presented herein of itself calls for dismissal of the cause. In the view expressed by Justice Clark in *Baker*, 369 U.S. at 258-259, the presence of the initiative in Colorado, and its use, puts an end to the matter.

As distinguished from the people of Tennessee, the people of Colorado have relief available to them without the courts and are possessed of "practical opportunities for exerting their political weight at the polls". The opportunity has been exercised, and in the exercise thereof the people by a plurality vote in every county, whether urban, suburban or rural dominated, chose Amendment 7 (305,700 to 172,725), and rejected specifically (311,749 to 149,822) a *per capita* method of apportioning the entire General Assembly. Their vote according to Governor Johnson, whose knowledge of Colorado, its people and their politics is not and probably never has been equalled,

was the result of being fully informed and intensely interested. See notes 31, 32, pages 930-931, 219 F. Supp.

Pertinent to this question is the extended comment of the court below,

"The initiative gives the people of a state no power to adopt a constitutional amendment which violates the Federal Constitution. Amendment No. 7 is not valid just because the people voted for it. If the republican form of government principle is not a useable standard because it poses political rather than judicial questions, the observation is still pertinent that Amendment No. 7 does not offend such principle. If the true test is the denial of equal right to due process, we face the traditional and recognized criteria of equal protection. These are arbitrariness, discrimination, and lack of rationality. The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary.

The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. At the most they present a political issue which they lost. On the questions before us we shall not substitute any views which we may have for the decision of the elec-

torate. In *Ferguson, Attorney General of Kansas, v. Skrupa*, 372 U.S. 726, 731, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93, the Supreme Court said that it refused to sit as a 'super-legislature to weigh the wisdom of legislation.' Similarly, we decline to act as a super-electorate to weigh the rationality of a method of legislative apportionment adopted by a decisive vote of the people.

We believe that no constitutional question arises as to the actual, substantive nature of apportionment if the popular will has expressed itself. In *Baker v. Carr* the situation was such that an adequate expression of the popular vote was impossible. In Colorado the liberal provisions for initiation of constitutional amendments permit the people to act—and they have done so. If they become dissatisfied with what they have done, a workable method of change is available. The people are free, within the framework of the Federal Constitution, to establish the governmental forms which they desire and when they have acted the courts should not enter the political wars to determine the rationality of such action." (219 F. Supp. at 932,933).

This we believe in any event lays to rest the argument of perpetuity.

So also should a word intervene upon the inference, if not direct assertion, that the history of Colorado is one disclosing, for ulterior or other purpose, inactivity in the field of apportionment. What is made patently clear by the testimony of Dean Rogers and the exhibits reflecting the apportionments since statehood is that there has been

unusual activity in the field. (Appendix, pg. 64-113; Exhibits E, pg. 213).

Our conception of the function of this Court is to consider the issue before it on the facts presently existing and before it. Nevertheless, a dissertation on discrimination in perpetuity is patently counterfeit. There is no discrimination. And our present form of legitimate state government in the legislative branch lasts only until the people desire to supplant it with another legitimate form.

Third: The apportionment plan of Amendment 7 treats alike those similar in fact.

The third and remaining test of Equal Protection is clearly met by Amendment 7. Those similarly situate, i.e. the rural areas, their peoples and their interests are treated alike, and the urban, metropolitan areas, their people and their interests are treated alike. In other words, there is an absence of "crazy-quilt" and a presence of continuing policy.

Again the division of the state into economic regions must be considered. There are three basically rural or sparsely populated areas: the western, the south central and the eastern. The Denver Research study points up the unifying similarities of these regions and why geographically, sociologically, and economically each are different from the other. (See D.R.I. Part I, pages 1-13).

Appendix C to the decision below, 219 F. Supp. 935-937, serves to clearly illustrate that no rural area has been discriminated against by any other rural area. What is shown there is that in the Western Region there are 8 senators representing 227,841 people, or 28,840 per sen-

ator. In the Eastern Region there are 5 senators representing 142,933 people, or 28,407 per senator. And in the South Central Region there are 3 senators representing 66,554, or 22,185 per senator.

The East Slope Region, i.e., the area of metropolitan population, is likewise within itself without any undue preference or discrimination.

The illustrative table is also included within Appendix C below. It is here reprinted.

Dist.	Co.	Sq. Mi.	Population	Senators	Population Per Senator
1-8	Denver	73	493,887	8	61,736
9-10	Pueblo	2,414	118,707	2	59,353
11-12	El Paso	2,159	143,742	2	71,871
13-14	Boulder	758	74,254	2	37,127
15-16	Weld	4,033	72,344	2	36,172
21-22	Jefferson	791	127,520	2	63,760
26	Larimer	2,640	53,343	1	53,343
19-20	Arapahoe	815	113,426	2	56,713
17-18	Adams	1,250	120,296	2	60,148
		14,933	1,317,519	23	57,283

The mean is shown as 57,283. The counties of Denver, Pueblo, Jefferson, Larimer, Arapahoe and Adams are clearly and closely aligned with this mean. In considering these counties alone, the mean or average, per senator, is 59,175.

What deviations are presented in the other counties permit of obvious explanation.

Boulder and Weld counties in 1960 had a population of 74,254 and 72,344 respectively. Had Boulder been left

with one senator, the situation antedating Amendment 7, and were one of two senators by whom Weld County had been represented for years taken from it, each would have exceeded the mean of the remaining Eastern Slope group considerably. The choice was made to leave Weld as it had been historically and add one to Boulder, consideration unquestionably being given to the present factor of Boulder's growth rate.

El Paso county population on the other hand exceeds to an extent the mean average per senator, but not of sufficient proportions to allow an addition of a senator to increase its representation to 3, and particularly so in that, as pointed up in the Denver Research study (I-45), there were approximately 28,000 uniformed military personnel in the immediate Colorado Springs area shortly after 1960.

It must also be observed with respect to the East Slope region that there are no counties, i.e., Senatorial Districts, which could be joined with any other. The allotment of additional senators to the region would disrupt the balance with the remaining areas of the state, and an indiscriminate increase in the number of senators throughout Colorado, in an effort to achieve the same balance through different means, would be in destruction of the ratio of House to Senate, i.e., the termination of a policy enunciated at statehood and adhered to since.

It must therefore be concluded that the Colorado plan of apportionment cannot in any particular be described as "crazy-quilt".

The standards of Equal Protection having been met there is no justification for the overwhelming mandate of

the people of Colorado to be turned out and the philosophy of others whether reasoned or unreasoned to in turn be supplanted.

The Fourteenth Amendment does not require this or any other Court to choose between alternatives.

CONCLUSION

It is respectfully submitted in conclusion that the judgment of the court below should in all respects be affirmed and the complaints in each case dismissed.

The people of Colorado by an overwhelming majority throughout the state have chosen that form of legislative government by which they are to be represented. The choice was made intelligently and upon full information. That form of legislative government which the Appellants would have the Court impose upon the people was specifically rejected by them, again by an overwhelming majority throughout.

The plan of apportionment which the people did choose insures them all a voice in the legislative department. It leaves with the majority the voice of the majority. When tested by the familiar and well defined standards of Equal Protection of the Laws, as this Court has said it must, its validity is not open to challenge, and we ask this Court to so declare.

Respectfully submitted,

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Appendix A

DISTINGUISHING CHARACTERISTICS OF SENATORIAL DISTRICTS EACH FROM THE OTHER AND UNIFYING CHARACTERISTICS INHERING IN MULTIPLE COUNTY DISTRICTS. TAKEN FROM DENVER RESEARCH INSTITUTE STUDY EXHIBIT "D".

WESTERN REGION

District No. and County	Distinguishing Characteristics	Unifying Similarities
29. Moffat Routt Rio Blanco Jackson Grand	1. Accessibility and state lines define boundaries 2. Largest district in Colorado over 8.8 million acres 3. Economy resource-oriented (minerals, agriculture, lumber, tourism, water)	1. U.S. Highway 40 is main transportation link 2. Resources important to all counties
37. Garfield Eagle Pitkin Summit Lake	1. Accessibility limited; mountain ranges define east and south boundaries 2. Economy resource-oriented. (minerals, agriculture, tourism, water) 3. 80% of land owned by governments	1. U.S. Highway 6 is main transportation link 2. All counties gained population in past decade 3. Counties uniformly have much government owned land

WESTERN REGION—Continued.

District No. and County	Distinguishing Characteristics	Unifying Similarities
32. Mesa	1. Trade and service center for much of western region 2. Steady population growth since 1900; up 30% in last decade.	
27. Delta Gunnison Hinsdale	1. Accessibility limited on 3 sides by high mountain ranges 2. Resource-oriented economy 3. Population declining	1. All 3 counties in Gunnison River Basin 2. All 3 counties lost population in last decade
33. Montrose Ouray San Miguel Dolores	1. Mining (particularly uranium) important in terms of both output (\$24.7 million) and employment (18.3%) 2. Population gained 14% 3. Over 60% of land owned by government	1. Agriculture important source of employment in all counties 2. Area mountainous, all counties have at least 30% ownership of land by governments
35. San Juan Montezuma La Plata Archuleta	1. Accessibility and San Juan River Basin define area well 2. Economy resource-oriented (agriculture, mining, and tourism)	1. Durango-Cortez and transportation network act as unifying influence

WESTERN REGION—Continued.

District No. and County	Distinguishing Characteristics	Unifying Similarities
	3. Population gained 25% between 1950 and 1960	
24. Gilpin Clear Creek Park Chaffee Teller Douglas	1. East-of-Divide mountainous coun- ties 2. Sparse population, rural 3. Economy resource- oriented (Agricul- ture, mining and tourism)	1. Counties similar in socio-econom- ic character- istics (age, edu- cation, income)
25. Fremont and Custer	1. Topography, accessi- bility define boun- daries on North, South, and East 2. Economic base more diverse than others in Western Region 3. Population older, lower income, and poorly educated	1. Fremont and Custer formed one county 2. U.S. Highway 50 is main trans- portation link

EASTERN REGION

District No. and County	Distinguishing Characteristics	Unifying Similarities
28. Logan Sedgwick Phillips	1. Agriculture dominant source of employment 2. Population predominantly rural; older	1. Agriculture major basic industry in all three counties 2. Transportation network unifying influence
36. Morgan Washington Yuma	1. Agriculture dominant source of employment; over 90% of land in private farms 2. Population predominantly rural; older 3. Oil production over \$50 million	1. Agriculture dominant source of employment and major land use in all three counties 2. Transportation network unifying influence
34. Elbert Lincoln Kit Carson Cheyenne Kiowa	1. Agriculture dominant source of employment and land use 3. District 2nd largest; covers over 6 million acres	1. All counties dominated by agriculture 2. Population characteristics similar—all lost people between 1950-1960 3. Transportation network unifying influence

EASTERN REGION—Continued.

District No. and County	Distinguishing Characteristics	Unifying Similarities
38. Crowley Otero	<ol style="list-style-type: none"> 1. Agriculture major source of employment, but economy more diversified than other eastern districts 2. La Junta major city in district; 45% of population urbanized 3. District in Arkansas River Basin, and should benefit from additions to water supply in future 	<ol style="list-style-type: none"> 1. Both counties lost population in last decade 2. Agriculture major basic industry in both counties 3. Transportation network unifying influence
39. Bent Prowers Baca	<ol style="list-style-type: none"> 1. Agriculture major source of employment 2. Population predominantly rural, older, and declining 3. District in Arkansas River Basin 	<ol style="list-style-type: none"> 1. All counties lost population in last decade 2. Agriculture major industry in all three counties 3. Transportation network unifying influence

SOUTH CENTRAL REGION

District No. and County	Distinguishing Characteristics	Unifying Similarities
31. Saguache Mineral Rio Grande Conejos	<ol style="list-style-type: none"> 1. Accessibility limited except to east; all in Rio Grande River Basin 2. Agriculture dominant source of employment; potatoes major crop 3. Population declining rapidly, economically depressed area 	<ol style="list-style-type: none"> 1. All counties lost population in past decade; all have low incomes and are economically depressed 2. Spanish influence important in all counties
30. Alamosa Costilla Huerfano	<ol style="list-style-type: none"> 1. Agriculture dominant basic industry 2. 41 percent have Spanish surname 3. Population declining, economically depressed area 	<ol style="list-style-type: none"> 1. All counties lost population in past decade; all classed as areas of substantial and persistent unemployment 2. Spanish influence important in all counties
23. Las Animas	<ol style="list-style-type: none"> 1. Greatest population loss in past decade of any Colorado county 2. Mining and agriculture major sources of employment; both declining 3. Economically depressed area 	

EAST SLOPE REGION

District No.	County	Distinguishing Characteristics
1-8	Denver	1. Population, trade and service center of Colorado and mountain region
9-10	Pueblo	1. Steel-based economy
11-12	El Paso	1. Dramatic population growth in past decade 2. Military and tourism are major basic industries
13-14	Boulder	1. Educational services, trade, and services are important sources of employment
21-22	Jefferson	1. Rapid growth as residential area 2. Family incomes highest in state
19-20	Adams	1. Rapid growth (highest rate of increase in state) as residential area 2. Younger, lower income residents
17-18	Arapahoe	1. Rapid growth as above average residential area 2. Incomes and educational levels among highest in state
26	Larimer	1. Diversified, healthy economy 2. Population concentrated in southeast corner
15-16	Weld	1. Leading agricultural county in Colorado 2. Population concentrated in southwest corner

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IN THE
**SUPREME COURT
OF THE UNITED STATES**

No. 508 October Term 1963

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens
of the State of Colorado, taxpayers and electors therein, for
themselves and for all other persons similarly situated,

Appellants,

—vs—

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLO-
RADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLO-
RADO, HOMER BEDFORD AS TREASURER OF THE STATE OF
COLORADO, AND BYRON ANDERSON AS SECRETARY OF STATE
WICK DOWNING and WILBUR M. ALTER.

Appellees.

EDWIN C. JOHNSON, JOHN C. VIVIAN, JOSEPH F. LITTLE, WAR-
WICK DOWNING and WILBUR M. ALTER,

Added Appellees.

=====

**APPENDIX TO BRIEFS OF APPELLEES
AND ADDED APPELLEES**

=====

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1. Portion of Pretrial Conference Transcript

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ARCHIE L. LISCO, Etc.,

Plaintiffs,

vs.

STEPHEN L. R. McNICHOLS,
Etc., et al,

Defendants.

CIVIL No. 6501

WILLIAM E. MYRICK, et al,

Plaintiffs.

vs.

FORTY-THIRD GENERAL
ASSEMBLY OF THE STATE OF
COLORADO, et al,

Defendants.

CIVIL No. 7637

OFFICIAL TRANSCRIPT

Pretrial Conference

Proceedings before the HONORABLE JEAN S. BREITENSTEIN, HONORABLE ALFRED A. ARRAJ and HONORABLE WILLIAM E. DOYLE, beginning at 9:30 o'clock a.m., on the 13th day of February, 1963, in Room 216, Main Post Office Building, Denver, Colorado.

APPEARANCES:

FRANCIS R. SALAZAR and **CARL L. HARTHUN**, Attorneys at Law, Denver, Colorado, appearing for the Plaintiffs in Civil Action No. 7501.

GEORGE CREAMER, Attorney at Law, Denver, Colorado, appearing for the Plaintiffs in Civil Action No. 7637.

DUKE W. DUNBAR, Attorney General of the State of Colorado, and **RICHARD BANGERT**, Assistant Attorney General, appearing for the Defendants in Civil Action No. 7501 and Civil Action No. 7637.

A. F. ZARLENGO and **V. G. SEAVY, JR.**, Attorneys at Law, Denver, Colorado, appearing as Special Assistants to the Attorney General in Civil Action No. 7501 and Civil Action No. 7637.

RICHARD S. KITCHEN and **HARLEY WILLIAMS**, Attorneys at Law, Denver, Colorado, appearing for the Intervenors in Civil Action No. 7637.

PHILIP CAROSELL, Attorney at Law, Denver, Colorado, Amicus Curiae.

MR. ZARLENGO: I wonder if I could add one thing to what the Court stated? We think the issue is very simple, whether or not there is denial of equal protection by the apportionment of senatorial districts under Amendment Number 7. In other words, we are speaking about Number 7 and not any legislation passed pursuant to Amendment 7.

THE COURT: I understand that that's the position of the parties, but, Mr. Zarlengo, I think we do have to consider what Mr. Creamer just said, that goes to a determination made by the Court. If the Court should hold against the validity of Number 7, then you would have the

question of the validity of the apportionment as it existed before and would exist without Amendment Number 7. Isn't that correct?

MR. ZARLENGO: Oh, yes, that would be true; if Your Honors would hold that the amendment was discriminatory.

MR. CREAMER: That's all I referred to. We would then be back essentially where we started and in the same posture we were without 7.

MR. CAROSELL: There is one thought, Your Honor. That is the assumption of Mr. Zarlengo is that the sole issue is the Senate and I insist that it is a wrong consideration.

THE COURT: As I have tried to say it several times, the question is the apportionment of the legislature, is that apportionment one which is valid under the provisions of the 14th Amendment requiring equal protection.

MR. CAROSELL: Both houses.

THE COURT: I am just saying Colorado General Assembly.

MR. CAROSELL: I agree with that.

MR. WILLIAMS: Does this include the Lamb Bill, or are we going to look first at Amendment 7? I think this is important to determine whether we are examining Amendment 7.

THE COURT: Well, Mr. Williams, as I understand the statement of the parties, there is no issue raised before this Court as to whether the Lamb Bill conforms or does not conform with Amendment Number 7. That issue is not in this case.

MR. SALAZAR: If it please the Court, there is one thing the Court mentioned, whether or not due process was in issue. I was thinking under the amendment I propose to make as to the wording in the heading of Number 7, it is too vague and indefinite and ambiguous, perhaps strictly speaking due process entered into that under that amendment and in that sense—

THE COURT: It may be. I can't say one way or the other, but do you see any other due process question?

MR. SALAZAR: No, sir, I don't.

THE COURT: All right. Well, I think the issues are pretty well defined, and it seems to me that the parties can easily agree to what the general issue is.

Now, I can't speak for Judge Arraj or Judge Doyle, but so far as I am concerned, I have no desire to have you go into a minutiae detail as to what might or might not happen on each word, paragraph, sentence and section of some statute. I think you have got a better lawsuit if you stick to the one general proposition.

JUDGE DOYLE: I feel the severability issue on the districting ought to be specifically noted, and Mr. Salazar has noted it.

MR. CREAMER: There is a problem on that, of course, and it might be well to note it, because there is the question of whether single member districting within multi-member districts would be a principle which would or would not be affected by the unconstitutionality of it and I know many people do have rather considerable interest in that aspect of the problem.

THE COURT: I am glad Judge Doyle mentioned that. That is a problem which we will have. If it should be held that it is not severable, of course, the matter will fall. If it is, you have another problem.

MR. CAROSELL: The thought that bothers me, Your Honor, is the questions of implementing legislation that is intimately tied up with Amendment Number 7.

THE COURT: But, Mr. Carosell, you are a friend of the Court here. No party has raised that issue and that issue isn't before the Court. We have the general issue as to whether Amendment 7 violates the 14th Amendment.

MR. CAROSELL: The only reason—

THE COURT: We are not concerned now on the issues presented by these parties whether implementing legislation conforms or does not conform with Number 7.

MR. CAROSELL: The only reason I bring that up is that Judge Doyle at the last hearing specifically asked should we wait for implementing legislation as a test to see what the legislation would do.

THE COURT: Mr. Carosell, you don't define the issues. You are just a friend of the Court. The parties define the issues, and according to the statements made thus far there is no issue on that.

MR. CREAMER: I think the matter Judge Doyle and other members of the Court had in mind was whether there would or would not be an apportionment bill enacted, and we know that there is, but the problems that are raised by that bill with reference to which some opinion of the Attorney General has been sought and rendered as to whether it does or does not comply with 7 are a very complex and quite technical range of problems.

The problem of whether or not 7 is constitutionally valid is a Federal matter we can very much more readily ascertain, and the fact of the implementing legislation does assist us in that we know now what the general scheme is that is involved, but whether the scheme properly carries out 7 doesn't in my own thinking have much to do with whether 7 is valid to start with or not, and I should be

rather reluctant to try to get that terribly involved range of matters in because it would involve a county by county and precinct by precinct survey of the state, which I don't think serves any problem in the fundamental problem we are trying to solve here.

THE COURT: Do you agree?

MR. ZARLENGO: Yes, sir.

MR. SALAZAR: Yes, sir.

MR. CAROSELL: If I may say one last word, when we first took this up before the first hearing and when this Court rendered its opinion, it was primarily upon the basis of the fact that the implementing legislation that existed at that time, which was the 1953 reapportionment act, was itself obsolete and did not conform to the organic law of the state and violated the 14th Amendment.

Now, by the same logic, if it is found that this implementive legislation, irrespective of whether or not it conforms to Amendment 7, violates the 14th Amendment, it itself is invalid.

THE COURT: Granting that, Mr. Carosell, the parties make the issues here and they say the question is whether Amendment Number 7 violates the amendment, and not whether the implementing legislation conforms with Amendment Number 7. Now, that is a simple issue, which the people of the State of Colorado are entitled to have decided. The decision in that may or may not result in questions involving technical details of the implementing legislation, but it seems to me you have to first get a decision on the broad, general question.

MR. CAROSELL: I agree with that, but I just cannot see how we could divorce getting the implementing legislation as we did the last time.

THE COURT: Well, now, I think there is at least general agreement with the issues and I think you know what they are to put them in a pretrial order.

**2. Full Transcript of Trial, Except Cross-Examination
of Witness Lawson by Appellants**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

ARCHIE L. LISCO, et al,

Petitioners,

v.

STEPHEN L. R. McNICHOLS,
etc., et al,

Respondents.

and

WILLIAM E. MYRICK, et al,

Plaintiffs
and
Petitioners,

v.

THE FORTY-THIRD GENERAL
ASSEMBLY OF THE STATE OF
COLORADO, et al,

Respondents
and

Defendants.,

FEDERAL PLAN FOR APPOR-
TIONMENT, INC., et al,

Intervenors:

CONSOLIDATED

Civil Action No. 7501

Civil Action No. 7637

OFFICIAL TRANSCRIPT

Testimony of Witnesses
Little and Johnson

Proceedings before the HONORABLE GENE S. BREITENSTEIN, HONORABLE ALFRED A. ARRAJ, and HONORABLE WILLIAM E. DOYLE, in Courtroom A, Main Post Office Building, Denver, Colorado, beginning at 9:30 o'clock a.m., on the 30th day of July, 1962.

APPEARANCES:

GEORGE L. CREAMER, Attorney at Law, Denver, Colorado, appearing for the Plaintiffs in Case Number 7637.

FRANCIS R. SALAZAR, Attorney at Law, Denver, Colorado, appearing for the Plaintiffs in Case Number 7501.

RICHARD BANGERT, Attorney at Law, Denver, Colorado, appearing for the Defendants.

RICHARD S. KITCHEN, Attorney at Law, Denver, Colorado, appearing for the Intervenors.

PHILIP J. CAROSELL, Attorney at Law, Denver, Colorado, appearing as Amicus Curae.

WHEREUPON, during the progress of the hearing, the following testimony and witnesses were produced:

MR. KITCHEN: Your Honor, we would like to call Mr. Little to the stand.

JUDGE BREITENSTEIN: Very well, come and take the stand, Mr. Little, and take the oath.

JOSEPH F. LITTLE

called as a witness by the Intervenors, being first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

BY MR. KITCHEN:

Q Mr. Little, would you please state your full name, address and occupation?

A My name is Joseph F. Little. I reside at 3675 South Franklin Street in Cherry Hills. I am an attorney at law with offices in 1015 Security Building, Denver, Colorado.

Q Your residence is in Arapahoe County, is that correct?

A That's right.

Q How long have you lived in Arapahoe County?

A About twenty-one years.

Q Now, Mr. Little, would you please outline briefly to the Court what political positions you have held in the State of Colorado?

A Well, I was a Democratic precinct committeeman and a Democratic district captain.

Q Would you give the periods of time involved?

A I was Democratic precinct committeeman from 1928, I believe, until about 1931. I was Democratic district captain of old District L from 1931 to 1934. I was Democratic co-chairman of Denver from 1934 to 1940. I was Democratic state chairman from 1948 to 1955, and I have also served on I don't know how many various committees, executive committees, and central committees, of one kind or another.

Q I think you stated that these precinct and captaincies were in the City and County of Denver?

A That's correct.

Q Mr. Little, with regard to your activity in the precincts in Denver and statewide, are you familiar with the allegations of the motion to intervene and the petition to intervene with regard to the operation of the present laws in the populous counties?

A Yes.

Q Would you please inform the Court as to the operation of the present constitutional requirement that no county be subdivided in allocating representatives and senators among the various counties?

A Well, it results in the first place in the larger counties such as Denver—I think there are—well, there are so many candidates on the ballot it is impossible for the average voter to know more than just a few of whom he is voting for. It means in the City and County of Denver each citizen is represented now by seventeen representatives and eight senators, whereas in other counties that proportion drops. For instance, in Pueblo, I believe you have got representation by two senators and four representatives, and many other counties are one senator and one representative, so you have got on the one hand an unequal representation, and on the other you have what amounts to a lottery, because I know that the vast majority of the people of Denver have no knowledge of the qualifications of the candidates, much less even know many of the candidates who are running, particularly for the House of Representatives.

Q What is the problem that the candidates face in the City and County of Denver?

A Well, they have a citywide race. I don't just quite understand your question.

Q How many precincts are involved approximately?

A What?

Q Is it true there are approximately 450 or 465 precincts involved?

A That's right.

MR. CREAMER: If it please the Court, we hope as a matter of courtesy to counsel and the witness not to interrupt, but, first, the questions are leading. Secondly, the problem is not a problem of apportionment but apparently of mathematical dynamics, and we do question for the reasons previously mentioned in objections to the whole of the line of testimony the propriety of the leading questions and propriety of purely political questions.

JUDGE BREITENSTEIN: Your objection will be noted. I am sure counsel will try to avoid any leading questions and the reception of evidence as to the need for dividing senatorial and representative districts is received on the basis of materiality and pertinence. That will be determined later.

As I understand the issues presented here, Mr. Kitchen, it is a question as to whether there has been a denial of equal protection of the laws because of the disparity in the apportionment among districts, not a question of whether a district should elect one or seventeen representatives.

MR. KITCHEN: Your Honor, I would like to state this for the Court. I am assuming now, first of all, that the Court is not going to dismiss this proceeding. We reserved that question in argument.

JUDGE BREITENSTEIN: Counselor, I didn't sustain any objection. There will be plenty of time for argument. My observations were just to make the record straight by receiving the evidence we are making no ruling on materiality and pertinence. You will have plenty of time for everything.

MR. KITCHEN: I just wanted to state this line of questioning is directed toward what the Court should do if there is found to be some lack of due process or equal protection.

JUDGE BREITENSTEIN: All right, go ahead.

Q (By Mr. Kitchen) Now, Mr. Little, have you had occasion as a precinct committeeman and district and county and state chairman to analyze the votes cast for senator and representative for the Colorado legislature in the City and County of Denver?

A Well, I undoubtedly have in the past, but I can't recall anything specific at the present time.

Q With regard to analyzing these votes, did you also have occasion during these periods to observe the manner in which candidates were supported and nominated and supported in the City and County of Denver?

A Well, it goes back again to this same situation. We have so many candidates on the ballot, people don't know whom they are voting for, for instance, in Denver, and the candidates here, if their names begin with A, B and C, if they get on the top line of the voting machine in the primary election and if they have some organized groups supporting them, they are almost certain to be elected. Seven out of our eight senators, as I recall it, from Denver have names beginning with A, B or C.

Q Mr. Little, what is the political technique which you describe with regard to the organized group that supports these candidates?

A Well, this gets into a situation where—let's take an organized group, maybe five thousand voters, in Denver. Now, ordinarily that group might have sufficient influence in the neighborhood of their respective members to probably influence the election of three or four representatives or maybe a couple of senators, but as things stand now, without this districting provision, this constitutional provision which says no county shall be divided into senatorial or representative districts, this group's influence is magnified many times. That five thousand votes can be used to pressure, to inform the candidates to support the attitude of this particular group. You have got five thousand votes that applies not to just the three or four that might come from their respective neighborhood, but to the entire seventeen. In other words, as I see it, the influence of pressure groups is many, many times magnified by the fact they are permitted to vote for so many candidates here in Denver instead of particular neighborhoods.

I might add along that same line, there are other counties in the state where if you do not live in the center of population, your chances of election are not good. For instance, Pueblo, and Colorado Springs would be another. Pueblo is entitled to four representatives. I think most of them all come from Pueblo. The reason is that Pueblo has the majority of population. If they are districted there would probably be one rural candidate and three from Pueblo. As it is now, Pueblo controls the whole thing. As the result, the people in rural Pueblo County are virtually disenfranchised.

I might say the same thing happens here. There are large areas of Denver which if Denver were districted would have their own representative or senator. As it stands now because of the quirks of politics in many areas they have nobody representing them.

Q You have in the past used a particular phrase, and I have not had a chance to inform you of your testimony this morning, but I would like with the Court's indulgence to ask you this question, whether or not the process you are referring to is not known as "single-shot" voting?

A No, that would be where you have some group that would simply concentrate on one or just a few particular candidates, and vote for them, but not vote for the entire seventeen, which would give those particular candidates quite an advantage over the other candidates.

Q Have you personally observed that phenomena under the present system?

A Yes, sir.

Q Would you say that is or is not a common phenomena under the present system?

A Well, I can't say it is common. It has been indulged in several times to my knowledge.

MR. KITCHEN: There are no further questions of this witness. You may examine.

JUDGE BREITENSTEIN: Mr. Creamer.

CROSS EXAMINATION

BY MR. CREAMER:

Q Mr. Little, I take it that you recognize that there is some problem of reapportionment existing in the State of Colorado currently? Is that the case?

A Yes, but that is not the sole problem. I don't think it is even the basic problem.

Q You do recognize that there is a differential between some rural counties and some urban counties and a differential between urban counties themselves, is that true?

A Yes.

Q Mr. Little, I take it that in addition you have an objection to the fact that there exists constitutionally a provision requiring that counties not be divided into sub-districts. That I gather is the purport of your testimony as elicited by counsel?

A That is right.

Q And this testimony is not intended, as I gather, to go to the fact that a redistricting is not needed?

A Pardon me?

Q I will strike it. Perhaps there are too many negatives to make it clear. Your testimony relative to the necessity for subdividing districts is not intended as testimony to the effect that there is no need for a redistricting, is that correct?

A Well, now, you have got two kinds of districts, if

you are talking about redistricting under the present constitution—

Q Yes.

A And not about redistricting under so as to provide one representative for each representative district throughout the state and one senatorial district for each senator throughout the state. I would say that the latter is by far more important.

Q That I am afraid wasn't my question. Do you recognize that there is a necessity for a redistricting under the present constitution?

A No.

Q You do not?

A No.

Q You consider that it is reasonable to continue the present differential under the present constitution?

A That's rather hard to answer this way. Let me give it to you first this way. If you redistrict under the present constitution, you are going to compound what I would only call as the lottery that exists in our larger counties. Every time you add a representative to Denver, every time you add a senator to Denver, you add at least two more names to the ballot, which makes it that much more confusing to the voters, many of whom, in fact the vast majority, do not know who they are voting for now.

I will put it this way, if you were to change the constitution first to eliminate that, then certainly it will be necessary thereafter to redistrict the state and senatorial and representative districts, yes. That's about the only way I can answer. I am sorry.

Q Mr. Little, do you consider that it is reasonable or rational to maintain in the House of Representatives four representatives for the County of Pueblo, with 118,000

population, and two representatives for the County of Arapahoe and Adams, with 120,000 population?

MR. KITCHEN: Object to the question, Your Honor.

JUDGE BREITENSTEIN: Overruled.

A Under the present—now, your first part of that question was what do I consider it proper—

Q Do you consider there is a rational basis in the present House of Representatives for granting to the County of Pueblo, with 118,707 population, four representatives, and to the County of Adams with 120,296 population two representatives?

A That question I cannot answer yes or no for the simple reason that it is a question of balancing which is the worst evil, and I would say that's the lesser of the two evils under our present constitution.

Q You propose under the amendment of which you are one of the sponsors, nonetheless, to redistrict the House of Representatives, do you not?

A That's right.

Q But you consider it unnecessary to do so?

A No, that isn't a fair assumption. The very fact that we are trying to do it now is to accomplish two purposes. First, to stop this situation of where a voter in Denver is confronted with a ballot of at least thirty-four candidates, seventeen Republican and Seventeen Democrat, most of which he has no knowledge of, the very fact we are trying to stop that situation and give the voter an opportunity for an intelligent choice. At the same time we are doing the thing which you are asking for, we are also asking for our redistricting for the State of Colorado, and legislative districts of as nearly equal population as may be.

Q In representative districts, you want the Senate to continue as unequal as possible, is that not the case?

A It is not as unequal as possible.

Q You want, I believe, a continuation of the present situation, Mr. Little, in which the smallest senatorial district contains 17,481 persons, and the largest with the same number of senators, namely one contains 53,343 persons, is that not true?

A That is correct.

Q And you consider there is a rational basis for a three to one differential in that matter?

A Yes, I do. For instance, you have got a bigger disproportion than that in the Congress of the United States. You have got—for instance, Nevada, with 200,000 people, and—250,000—they have two senators. New York has two senators with sixteen million.

Q Mr. Little, do you recognize there is a distinction between a sovereign state and an administratively bounded county?

A In the sense they are each geographical areas, there is none.

Q I see. The fact of their sovereign capacity has, in your opinion, no distinguishing characteristic or function?

A I think when the Federal constitution was written, Mr. Creamer, that same question came up. You had colonies with large areas of population, concentrated population. You had others that did not, and it was felt there should be a differentiation in the Congress of the United States. Consequently, the Senate was based on area, the House of Representatives on population.

Q Mr. Little, the County of Huerfano has 70,000 and Denver has 490,000. Do you consider the differential is supposed to be continued indefinitely on a nine to one basis?

A It doesn't need to continue indefinitely. It can

continue for as long as the people do not want to change the State constitution, and they can do that at any election.

Q Is it your opinion those people who are 490 odd thousand in Denver must continually, though guaranteed equal protection of the law, be unequally represented as long as someone else wishes them to be?

A They are unequally represented right now.

Q Violently so.

A Umm—

Q Violently so?

A Well, that's a matter of opinion.

Q Mr. Little, your proposed amendment does not become operative until the year 1964, is that correct?

A That's correct.

Q So that nothing under that amendment would be done to correct the legislative session leading to the election of the 44th General Assembly, which will take its seat in 1963, January, 1963?

A That's right, it couldn't be.

Q That's correct, and you continue—you believe that it is desirable that nothing should be done by this Court to correct a situation which your amendment cannot correct by its terms?

A Mr. Creamer, this Court cannot amend the constitution of the State of Colorado. It might declare that provision regarding the districting of counties was contrary to the Federal constitution, but beyond that it is a matter that rests with the people of the State of Colorado. Again, I am making this statement—

Q I do not believe there is anything in the action

before this Court that proposes to withdraw from the people of Colorado the right to civil—

MR. KITCHEN: Your Honor, I will object to the argument with the witness.

JUDGE BREITENSTEIN: Let's don't argue with the witness. Your last few questions have been argumentative.

MR. CREAMER: Perhaps, sir.

JUDGE BREITENSTEIN: Those arguments are better presented to the Court. We will do the best we can.

MR. CREAMER: I would agree with Your Honor. I think no further questions of Mr. Little. Thank you.

JUDGE BREITENSTEIN: Mr. Salazar, have you got any?

MR. SALAZER: Just a couple, Your Honor. May it please the Court?

FURTHER CROSS EXAMINATION

BY MR. SALAZAR:

Q Mr. Little, it is my understanding that you agree that the present system of apportionment is improper, is this correct?

A Yes.

Q But it is your feeling that also our present system of districting is improper as well, is this correct?

A You mean—

Q Or lack of districting?

A You mean insofar as a county may not be divided?

Q Yes.

A That's correct.

Q Because you feel this lack of districting is improper, you believe we should go along with the improper apportionment somehow?

A Well, as I told Mr. Creamer, it is a question of balancing evils, and I think the far greater evil is the situation which makes the election in our larger counties of senators and representatives nothing more than a lottery. People simply do not know who they are voting for. I think once we give them the opportunity of knowing their candidates, that is the more important thing. The disparity of numbers, which is so, is not nearly as bad as not knowing who you are voting for.

Q Now, you used the illustration of Denver. You live in Arapahoe County?

A Yes.

Q I believe you are aware that Arapahoe County is considered one of the most underrepresented counties in the United States, not just in Colorado, but in the United States?

A It has less representation than it should, yes, sir.

Q Now, how many representatives do you have in Arapahoe County?

A Two.

Q Let us say there were four or six or even eight in Arapahoe County, if it were reapportioned. Do you mean to say you do not believe you or other people in Arapahoe County could familiarize yourselves with that many people?

A I might because I am interested in politics, but I would say from my best experience half the people in Arapahoe County would not.

Q Do you think that half the people in Arapahoe

County familiarize themselves with the two representatives they now have?

A That's possible, yes.

Q Wouldn't you say those who are going to familiarize themselves with the representatives do so with two or ten, those who are not going to do so are not going to even with two or ten?

A That is a question of degree. Everytime you have an additional representative to the Denver ballot or Arapahoe County ballot, of necessity you must add two. I mean, everytime you give Denver or Arapahoe County one, you must of necessity add two candidates to their ballot, one Republican and one Democrat, and the result is you have got a geometrical progression in a way. When you said eight, you have sixteen names on the ballot. When I was co-chairman of Denver, we had thirteen representatives. I knew the Democrats, one or two of the Republicans, and I didn't know all, and I don't believe there is anybody in Denver at that time or even now that knows all of the people on the ballot.

Q You were the Democratic county chairman?

A Yes, sir.

Q Did you make any attempt to know?

A Yes, I did.

Q Would you have voted for them if you had known them?

JUDGE BREITENSTEIN: That has nothing to do with this lawsuit. Defendants?

MR. BANGERT: We have no questions, Your Honor.

JUDGE BREITENSTEIN: Redirect?

REDIRECT EXAMINATION

BY MR. KITCHEN:

Q Mr. Little, a question was asked with regard to the operation of the Federal plan in 1964 and you, of course, are familiar with the text of that, which before you were here was admitted as an exhibit. Would you please point out the savings clause in that amendment?

JUDGE BREITENSTEIN: Well, that speaks for itself, Mr. Kitchen.

MR. KITCHEN: All right, no further questions.

JUDGE BREITENSTEIN: Any other questions of Mr. Little? You may step down.

THE WITNESS: May I be excused?

JUDGE BREITENSTEIN: Any objection to Mr. Little being excused?

MR. CREAMER: No objection.

MR. BANGERT: No objection.

MR. SALAZAR: No objection.

JUDGE BREITENSTEIN: You are excused from further attendance.

MR. KITCHEN: Call Edwin C. Johnson to the stand.

JUDGE BREITENSTEIN: Come forward, take the stand and be sworn.

HONORABLE EDWIN C. JOHNSON

called as a witness by the Intervenors, being first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

BY MR. KITCHEN:

Q Would you please state your name and address?

A Edwin C. Johnson, 901 Sherman Street, Denver.

Q You are one of the intervenors in this action, is that correct?

A I am, sir.

Q What is your voting residence, Mr. Johnson?

A Craig, Colorado.

Q What county is that?

A Moffat County.

Q How long have you maintained a voting residence in that county?

A Since 1910.

Q Would you briefly outline your political experience in the State of Colorado?

A Well, I was in the Colorado General Assembly, in the House.

JUDGE BREITENSTEIN: I think the Court is fairly familiar with the Senator's record.

MR. KITCHEN: I think we would like to have this matter in the record.

JUDGE BREITENSTEIN: Very well.

A (Continued) Service in the Colorado General Assembly in the House, four terms. President of the Senate as Lieutenant Governor, one term, and three terms as Governor of Colorado, and three terms as United States Senator from the State of Colorado.

Q When did this political experience commence, what year?

A In 1922. I was elected in 1922 and began service in 1923.

Q Prior to your election to the House of Representatives, had you any other experience in elective office?

A Yes, I was Assessor of Moffat County.

Q How long was that?

A Well, I was elected for two years. I did not serve my full term. I resigned before my term had expired. I don't remember the exact number of months, but probably for about eighteen months I was Assessor of Moffat County.

Q Now, in connection with your service in the legislature, did you have occasion while in the legislature to consider matters affecting reapportionment of the legislature or districting of the legislature?

A As I recall, the matter did not come up, was not presented to the General Assembly, by bill during the term when I served as a legislator.

Q Did you have experience with this problem when you were Governor of the State of Colorado?

A No, I don't recall that I had any experience with the matter of apportionment during my three terms as Governor of Colorado.

Q Would you please state what your—prior to your association with the intervenor Federal Plan—what has been your experience in connection with the problem of reapportionment of the Colorado legislature?

A I was appointed by the Governor of Colorado, I believe it was in 1958, to serve on a committee of some forty members appointed from the State of Colorado to study apportionment and to report to the Governor our findings.

At the first meeting of this committee, committee of forty-one, I believe it was—at the first session of that committee's meeting, which I attended, I was elected or selected to the executive board and made chairman of the executive board, and asked to hold hearings throughout the State of Colorado on the question of apportionment.

We did hold hearings and we had some 200,000 words of testimony on the question from all parts of the State of Colorado. We did hold a great many executive sessions, and we did hold a session in which all of the delegates appointed by the Governor appeared. We held that session in the chambers, in the Senate chambers, of the State of Colorado, and we took votes on the proposal on the report that we were going to submit to the Governor, and we did prepare a report and a minority report was also prepared and our report was submitted by Mr. Justice Alter. The minority report was submitted by Mr. Justice Alter.

Q Was there a minority report?

A There was a minority report.

Q And was that submitted with the report of the committee?

A I am not sure. I am not certain.

Q You were the chairman of the executive committee, is that right?

A That is correct, but I was not chairman of the committee. Judge Alter was chairman of the committee of forty-one.

Q Judge Alter was—was he then a member of the Colorado Supreme Court?

A No, he had retired at that time.

MR. KITCHEN: If it please the Court, I am going to ask that this report that was previously offered be marked for identification.

JUDGE BREITENSTEIN: I thought we got over documentary evidence a little while ago, Mr. Kitchen. You said you didn't have any more.

MR. KITCHEN: Well, at that time, Your Honor, I

stated, if you will recall, to the Court that if the portion of the witness' report was admitted, we would like to have the entire report.

JUDGE BREITENSTEIN: Have it marked. We try to have orderly procedure to get the documentary evidence all at once. Go ahead.

MR. CAROSELL: Your Honor, I am put in a delicate position. This volume belongs to the Legislative Council.

JUDGE BREITENSTEIN: Did Mr. Kitchen get from you?

MR. CAROSELL: Yes.

JUDGE BREITENSTEIN: Did you get Mr. Carosell's permission?

MR. KITCHEN: I thought I did during the recess.

MR. CAROSELL: I think even the Governor lost his. They are hard to get. I had the Denver Public Library make a set for the Court.

JUDGE BREITENSTEIN: Are you objecting to the use of this copy?

MR. CAROSELL: I don't, so long as I am not held responsible for it, and I want it back.

MR. KITCHEN: Well, I will undertake to duplicate it, if Mr. Carosell desires and substitute another set.

JUDGE BREITENSTEIN: Whose copy is it?

MR. CAROSELL: This belongs to the Colorado Legislative Council of the State of Colorado. I borrowed it for the use of this Court, but not as an exhibit that I can't get back.

MR. KITCHEN: I simply ask that at an appropriate time we will ask—

JUDGE BREITENSTEIN: You understand, Mr.

Kitchen, if we receive this and then we will have to do it on the basis they can withdraw it and you will have to duplicate it?

MR. KITCHEN: Yes.

JUDGE BREITENSTEIN: Your client can afford to do that?

MR. CAROSELL: Yes.

MR. KITCHEN: Yes.

JUDGE BREITENSTEIN: All right, go ahead.

MR. CREAMER: If it please the Court, there is another problem. When we initially discussed documentary evidence, it was my understanding these documents were not the whole of the proceedings or whole of the report. They did not contain the so-called minority report, and they were a fragment of the matter, and that appears to have been one of the problems to begin with, and I fail to see—

MR. CAROSELL: The trouble is with Mr. Creamer he listens to himself so much, he doesn't—

JUDGE BREITENSTEIN: Just a minute. We don't like aspersions between counsel. We don't want that to happen again.

MR. CAROSELL: I apologize to the Court. There is a majority and minority report, which now formulate the entire report of Mr. Johnson's committee.

JUDGE BREITENSTEIN: All right, is it marked?

THE CLERK: These will be marked Intervenor's Exhibit C, and there will be one, two, three, four, five, six, seven parts.

INTERVENOR'S EXHIBITS C-1 through C-7 were marked for identification.

JUDGE BREITENSTEIN: Are there any objections to Intervenor's Exhibits C-1 through 7?

MR. BANGERT: No objection on the part of the respondent.

MR. CREAMER: We object to it, if it please the Court, on the basis on which we have objected to this entire line of testimony. I am very familiar with the report, as I am sure the Court is. It is a conspectus of the opinions of hundreds of people who said what they thought about who should be represented by whom where, but it has nothing to do with this particular problem, and it has really, moreover, not a place in the circumstance in which the witnesses themselves are introduced extraneously in the report after all documentary evidence is examined and the report is ruled out as brought in simply because a witness states he was the chairman of an executive committee that made it. There never was any problem about any identification of the report to begin with and substantively it is not more admissible now than when formerly excluded.

MR. CAROSELL: With the Court's indulgence—

JUDGE BREITENSTEIN: Mr. Carosell. Mr. Salazar?

MR. SALAZAR: If the Court please, I do object frankly on the same grounds as Mr. Creamer.

JUDGE BREITENSTEIN: Mr. Carosell, do you have any objection? Remember, I said objection.

MR. CAROSELL: No objection. I want to show the relevancy.

JUDGE BREITENSTEIN: I asked if you had an objection, not whether you were a proponent. The exhibit is going to be received. If you talk a little more, maybe I will rule it out. The exhibit will be received without any ruling on materiality, and I might say for the benefit of counsel, I see considerable merit in Mr. Creamer's argu-

ment on the issue. Go ahead, we want everybody to have their say here.

INTERVENOR'S EXHIBITS C-1 through C-7 for identification were received.

Q (By Mr. Kitchen) Mr. Johnson, I hand you these Exhibits C, which have been numbered by the Clerk through C-7, and ask you if these are the report of your committee that you have testified to?

MR. CREAMER: If it please the Court, the exhibits are admitted at this particular stage.

JUDGE BREITENSTEIN: Objection sustained. The exhibits speak for themselves.

MR. KITCHEN: All right.

Q (By Mr. Kitchen) Sir, before I get into the basis of reapportionment itself, I should like to ask you if during your long political career, you have had experience with facts of the legislation of representatives for the House of Representatives and the Senate from the populous counties of the State of Colorado?

MR. CREAMER: If it please the Court, I object to the question as being general in the extremest degree and without usefulness. The Governor has testified that the problem did not officially come to his attention.

JUDGE BREITENSTEIN: That's a preliminary objection. It is overruled. Go ahead.

A I didn't hear the ruling.

JUDGE BREITENSTEIN: You may answer the question.

THE WITNESS: I may answer it?

JUDGE BREITENSTEIN: Yes.

A (Continued) Certainly, I was acquainted with every member of the General Assembly, both in the Senate and House, the presiding officers and all the other officers of the legislature, during the time when I was a member of the General Assembly and during the period when I was presiding—when I was president of the Senate and when I was Governor of the State of Colorado. I had close relationship with all the members of the General Assembly from all counties, all districts in the State of Colorado.

Q Now, based on that experience, would you please state the effect of the present constitutional provision prohibiting subdivision of populous counties?

MR. CREAMER: I will not urge this at length, but I will make for the record the same objection heretofore made. It is outside the scope of the issues presented by the plaintiff.

JUDGE BREITENSTEIN: Yes, that objection will be noted, Mr. Creamer; and the materiality and pertinence of the testimony will be determined later. The witness may answer the question. Go ahead.

THE WITNESS: I didn't hear the ruling of the Court.

JUDGE BREITENSTEIN: You are permitted to answer.

THE WITNESS: Would you ask the question again, please?

JUDGE BREITENSTEIN: Read the question back.

REPORTER: "Now, based on that experience, would you please state the effect of the present constitutional provision prohibiting subdivision of populous counties?"

A I am sorry, I didn't hear the exact question, and it is technical.

JUDGE BREITENSTEIN: Your objection will be noted to the question as rephrased and the ruling will be the same. Rephrase the question.

Q Based on your experience, would you please testify as to the effect of the constitutional provision prohibiting subdistricting of populous counties?

A I can express an opinion on that question, if that's what you want?

Q Yes.

A It is my opinion that members of the General Assembly, both in the House and in the Senate, should not be elected at large, but should be elected from districts within those populous counties in order to give the people living in those districts the equity and the proper representation which they deserve.

Q Do you feel that the people in those districts are getting the equity and representation which they deserve under the present system?

A No, I do not. I believe there are a great many communities in populous counties which have never had a representative in either the House or Senate in all the years that Colorado has been a state, many areas.

Q Now, getting to a second question, with regard to the apportionment of representatives, and referring to your experience on the investigating committee that you testified to, the Governor's committee, and also your experience as a legislator, governor and United States Senator, I ask you whether you feel there is a rational basis for area representation as distinguished from strict population representation in at least one house?

A In at least one house, there is a basis, in my opinion.

Q What are the peculiarities in your opinion of the State of Colorado which require such a division in at least one house?

MR. CREAMER: To this again, we will make a general objection on the basis that there is no such provision in the present constitution and we are not here dealing with the problem of amount. I will not argue it, because I have previously done that.

JUDGE BREITENSTEIN: I understand the objection. The objection will be noted. It seems to me that this goes to the question of whether you have a rational districting or apportionment. The objection will be overruled.

A Was it ruled that I may answer?

Q Yes.

A Yes, there is a basis and that basis has to do with topography, with mountainous areas, with great distances, and with the great multitude of questions, legislative questions, which arise in the General Assembly on many, many points. For instance, a senator from my district in Colorado has to know a great deal about county government, about school government. He has to know a great deal about tourists and highways and railroads. He has to know a great deal about state-owned land. He has to know something about agriculture and the production of crops, and he has to know a great deal about coal mining and uranium mining and milling of uranium. He has to know a great deal about a great many subjects, and, yet, the population of the district in which I live is a very large district. It is composed of Moffat, Rio Blanco—no, I will take that back. It is composed of Moffat, Routt, Grand and Jackson Counties, and has an area of more than 5500 square miles and it does not have a population of much more than 21,000 people, according to the last census, and, yet, all of these varied activities. Human activities are dealt with by the General Assembly of the State of Colo-

rado, and it is very important that an area as large as that and having as many varied interests as that area does have should have representation, informed representation, in the Colorado General Assembly.

Q Now, are the district boundaries of the present Senate, and directing your attention to Intervenor's Exhibit B, are the district boundaries of the present Senate intended to give effect to the philosophy which you have just expressed?

MR. CREAMER: Now, just a moment. To this I must object on purely technical grounds. There is no indication whatsoever that the witness is qualified to state what the present existing boundaries are intended to do. He has stated specifically they were not done during any of the periods he was officially in office, and his opinion as to what someone else's intent may have been, though it is most estimable and worthy in many respects, is not proper on such a question.

MR. KITCHEN: I will rephrase the question.

JUDGE BREITENSTEIN: All right, go ahead.

Q Would the present Senate boundaries as shown on Exhibit B have a tendency in your opinion to give the effect of representation to those areas which you have stated as being desirable?

A Yes, sir, they would, and I want to say this, too, in addition to that question. On two occasions, in the year 1954, in the legislation of 1954, and the legislation of 1956, this question arose, the question of apportionment of the State of Colorado arose, and I voted on the question that was submitted to the people on the ballot in those two years, and they dealt very definitely with the apportionment of the Senate, which I have in my hand here, and in 1954 the people voted not to change the apportionment as delineated by this map which is in my hand, and in 1956 when the

question was directly whether the Senate should be apportioned on a strict population basis or upon an area basis, the people of the State of Colorado voted 349,000 votes against changing the apportionment as herein described, and the matter lost in 1956 by a majority of 191,000 votes plus, a little more than 191,000 votes, so I have had some—my vote was among those which supported the idea that the present delineation of senatorial districts was a proper delineation.

Q Now, with regard to that delineation, and the hearings which you conducted, what information—very briefly, would you outline to the Court what general information you obtained with regard to the economics in those districts and the other factors which the people in those districts have in common other than topography and the other matters you have mentioned?

A Well, in the hearings that were held, we had many witnesses and their testimony was varied. There was testimony on all points on this question, and on many points that I don't recollect as being valid points, but there was a great deal of testimony. I can't testify—I can testify that there was a considerable amount of testimony. I can't evaluate the quantity of it, supporting this delineation I have here in my hand.

Q Based upon that testimony, is it your feeling that the present senatorial districts have a rational basis, the boundaries of the districts?

A That is correct, sir.

MR. KITCHEN: No further questions.

JUDGE BREITENSTEIN: Mr. Creamer?

CROSS EXAMINATION

BY MR. CREAMER:

Q I understand, Governor, that it is your opinion that the present senatorial districts have a rational basis?

A Have a rational basis?

Q Yes.

A Yes, sir, that is my opinion.

Q Then I take it that you do not believe that there should be any change in the present senatorial districts?

A That is my opinion, that there should not be any change; that since it was in a way ratified by the people on two occasions within ten years, and based upon the topography of the State of Colorado and the scattered population and the activities of the people in the State of Colorado, I think that the present delineation of senatorial districts is as nearly correct as it could possibly be done.

Q I see.

A Under the circumstances in which it has to be done.

Q Will you explain, Governor, if there is a difference, why you consider that there is a difference between the Senate and House of Representatives with respect to the freezing of the present districts?

A Yes, I think that's based on the Federal plan in the operation of the Congress. We have two houses in Congress. One house, for instance, New York State, has forty-three Congressmen, forty-three members of the House, and fourteen states, of which Colorado is one, has forty-one members of the House of Representatives. I think that that's perfectly all right, because it is based upon a population, a population record, and I think that's very proper, and that it is all right, but in order to balance the activities

of the people, as against strict population basis, the Congress of the United States has another house and these fourteen great states, of which Colorado is one, have twenty-eight members of the Senate. That is the Federal system of representative government, and I think that it has proved its worth. I think it has proved its value. I think it has proved its adaptability through all the years our government has been operating in the development and growth of the United States of America.

Q Governor, the United States is in the form of a union of fifty sovereign states, is it not?

A That is correct.

Q The State of Colorado is not formed of a union of sixty-three sovereign counties, is it?

A That is also correct.

Q And the senate districts which you—

A It doesn't have any sovereign counties.

Q And the legislature is in fact at liberty to abolish boundaries of any county or to abolish the county altogether, at any session it may see fit, is it not?

A Well, the legislature has authorized the boundaries of practically all the counties in Colorado.

Q Yes, and the senate districts most certainly are not sovereignties in any sense or quasi sovereignties?

A They are not sovereign. The State of Colorado is sovereign.

Q Yes.

A But the county divisions in Colorado are not sovereign and I don't think that that is the important matter. I think the important matter is whether the people and the activities of the people and the occupations of the people—

Q Governor, why is there a difference between the sanctity of a Senate district boundary and the sanctity of a House district boundary?

A Why should there be a difference?

Q Yes.

A The Congress of the United States found that there was a difference and so they had two houses, one of them to represent the activities of the people and the other to represent the population of the people; and I think that's a happy combination. I think it gives us a balanced program of government for the United States.

Q Senator, you have made reference to your own county of Moffat?

A Right.

Q And the districts in which it is located. For purposes of the Senate, Moffat is in a district consisting of itself, Rio Blanco, Routt, Jackson and Grand. For the purpose of the House, it is in a district to which there is added Garfield County. Is there any—

A No, no, not in the House.

Q Pardon me, for the purpose of the House, from which there is subtracted Rio Blanco and Rio Blanco County is added to Garfield, Moffat, Routt, Grand and Jackson for the House, and the five counties for one and four for the other. Is there any historical reason why Moffat County should be in one aggregation for the Senate and a separate one for the House?

A Yes, I think that there is. Moffat County, so far as the House is concerned, is one county in four, and so far as the Senate is concerned it is one county in five, and I think that you have to go down to the work of the General Assembly to get the answer to it. Now, I believe that population is the correct way, as our founding fathers have

discovered with the United States Government, to set up a House of Representatives, and I believe that the Senate should not be identically represented to the House. Otherwise, why not have what Nebraska has, just one house, if you are going to have them identical in area and identical in every other way. You might just as well have a unicameral legislature, such as Nebraska has.

JUDGE BREITENSTEIN: Mr. Creamer, pardon me for interrupting. The Court is going to take its noon recess at this time. The Court will be in recess until 1:30 this afternoon.

(The Court recessed from 12:00 o'clock a.m. until 1:30 o'clock p.m.)

JUDGE BREITENSTEIN: Proceed, Mr. Creamer.

MR. CREAMER: Thank you, Your Honor.

Q Governor, with relation to the matter of the Senate districts, as I understand it, the amendment which you propose would alter the present Senate districts by merging Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln into a single district, is that correct?

A Did you say Elbert?

Q Yes.

A Elbert with those other counties.

Q Elbert, Kiowa, Kit Carson, Lincoln and Cheyenne?

A That is correct, sir.

Q So that that would be a change of the present district situation?

A That would be a change.

Q Yes, and—

A A slight change.

Q Yes, and the proposed amendment would increase the representation of the present districts constituting Arapahoe, Adams, Jefferson and Boulder from one senator to two senators apiece, increasing the Senate from thirty-five to thirty-nine in membership, in that correct?

A That is correct, and that gives the surrounding counties around Denver an equal number of senators to the City of Denver. Each of them would have eight. The metropolitan counties would have eight and Denver would continue to have eight.

Q Correct, and that would also equalize the present situation of Pueblo County, which has two senators, and 118,000 people, and Adams and Jefferson, which each have over 120,000 people, but only one senator, is that correct?

A Jefferson County has—according to the last census, Jefferson County has 127,500, and Adams County has—

Q 120,296.

A That is correct.

Q And those in Pueblo County presently is 118,707?

A That is correct.

Q But Pueblo has two senators now and each, Adams and Jefferson, have only one now?

A That is correct.

Q Now, do you consider this an improper representation presently?

A Well, we considered it improper and that's the reason we changed the number of senatorial districts.

Q Right now, Governor, it is provided in the proposed amendment that those senate districts which would have more than one senator be redistricted on the basis of population periodically, but those which have only one senator remain frozen. Can you explain the reason for that proposal?

A If a district has one senator, you can't very well divide it and have a half a senator, but where there is more than one you can divide it and have as many districts as senators in the county.

Q What happens when the district that has only one senator grows to such level it should have two?

A If you have one senator from the—

Q On the frozen district senator principle. Assume you have a district that is frozen with one senator and it grows, as for example Mesa County might, since it seems to be growing on the western slope, until it reaches population which is where it has a right to two senators. What does it get under this scheme?

A Well, I don't know what you mean. There is no district frozen in the State of Colorado because the people have a right to each two year period unfreeze or to change in any way that they want to, so there is nothing frozen.

Q You mean, there must be a constitutional amendment each two years in order to keep the matter in order of population?

A I mean that the people have a right to make changes if they want to and there is a way for them to do it.

Q Thank you. Senator, presently the county of Weld has a population of 72,344?

A 343.

Q And the county of Boulder has a population of 742,054. Weld has two senators. Boulder has one senator. They are next door neighbors and rather similar counties. Is this a situation with a rational basis, in your opinion?

A Well, Boulder County is a county that has been growing very rapidly and Weld County is a county that, as I understand it, has been declining in population. You are reciting the population as shown by the 1960 census?

Q Correct.

A I am sure that Boulder County has made a considerable growth and is making considerable growth presently.

Q Governor, as a matter of fact, the census shows that the non-urban portion of Colorado lost six percent of its population in the last ten years and the urban part gained fifty-five percent in population, so isn't it true that these frozen areas are progressively losing in population as a whole?

A I don't know anything about what you mean when you say frozen. There is some change. However, so far as the activities are concerned, the human activities, in the districts that are districted to senators, these problems, these problems caused by human activities, has not changed them very much. They don't fluctuate so very much.

Q Then, Governor, is it my understanding that what is proposed is to represent economic problems and economic groups in the Senate and not people?

A Well, I don't understand it that way. You have to have—you have to represent in a legislature. A legislature deals with problems and these problems occur in areas that do not have as great a population more frequently than they do where there is a greater population. You can't pin everything to population, so far as legislative problems are concerned. Now, each of these areas and all of the areas in the State of Colorado under the proposal which we are making to amend the constitution would have representation in the General Assembly of the State of Colorado.

Q Governor, isn't it a matter of fact, and you certainly have more experience in the field than anybody here, the fact that any legislator as his legislative duty must represent and consider whatever economic problems affect the community of which he is a legislator, but he is

not elected because of economic problems or a representative of them, is he?

A Well, representative government means that many things are considered in that. It is not altogether people. Now, as long as we represent the people on a basis in which we have—where we give them equal representation according to population, then the population does have representation in the legislature, in the General Assembly as a whole.

Q Governor, presently 556,000 people elect 19 out of 35 of our senators, and 1,207,000 people elect 16 of our senators. Do you consider that economic requirement is such that one-third or, pardon me, one-fourth of the population must elect 52 percent of the Senate?

A Under the Federal amendment, the seven urban counties, starting with Pueblo, including Pueblo, El Paso, Arapahoe, Adams, Jefferson, Denver and Boulder, these very great urban counties under the Federal amendment would have twenty senators and the rest of the state, twelve times as large in area as this urban area, would have nineteen senators.

Q But that is not presently the case?

A That is not presently the case.

Q And if that is not presently the case, and if the case is as I have stated it, then there is something irrational in the present case, is that not so?

A Well, you can call it irrational, if you want to. It doesn't seem to me that that word describes what the situation is, but the fact that the Federal amendment has changed the situation that we now have and made an improvement in it so far as senatorial representation is concerned, I don't see why as long as we are making some improvement it is a recognition that nothing is perfect.

Q And it is a recognition that what we have is quite defective, is that not so?

A It is a recognition of the fact that this great urban area which we are speaking of, these seven counties, have shown a tremendous increase in population between the census of 1950 and the census of 1960, and the apportionment is supposed to recognize the results of a census.

MR. CREAMER: Thank you, Governor. I have no further questions of the Governor.

JUDGE BREITENSTEIN: Very well. Mr. Salazar, do you have any questions?

MR. SALAZAR: Yes, I do, may it please the Court.

FURTHER CROSS EXAMINATION

BY MR. SALAZAR:

Q Governor, your plan is known as the Federal plan, is it not?

A That is correct.

Q And yet it is not synonymous with our Federal system in the sense that the representation would not be the same as for the United States Senate, would it?

A Well, it is—the State of Colorado cannot be said to be identical to the United States of America, if that's what you mean.

Q And you do not intend to have one senator from each county or even one senator or two senators from each senatorial district, do you?

A No, indeed.

Q What you have done is arbitrarily go through the counties and have added some senators to those districts that you believe are increasing in population or have done so, and have left the other districts that have decreased

in population with their present Senate representation, have you not?

A Would you like it better if each county was given a senator in Colorado?

Q Governor, please, I am asking the questions, if I may.

A I wouldn't like it.

MR. KITCHEN: If it please the Court, I think we should object to the question, if this is going to be arguing with the Senator.

JUDGE BREITENSTEIN: Objection sustained. It is an argumentative question.

Q Governor, do you believe in your theory that you have for representation that no matter how limited the population becomes in a county, that it is still entitled to a senator?

A No, I don't think that any amendment to the constitution has in mind that it is going to be that way forever. I think that changes might come, and changes will come, and there are ways to amend any constitutional provision under the constitution and under the law.

Q Then the counties that at the present time are the senatorial districts that are decreasing in population, do you foresee that some of them, if they decreased to a great enough extent would lose their senatorial representation completely?

A It is my opinion that the counties in the western part of the State of Colorado are going to show an increase in population in the next census and it is also my opinion that the counties east of—in the eastern part of Colorado are going to show an increase in population. We will have to wait for the census of 1970 before we will know what is going to happen, but my guess is that these areas in

eastern Colorado, and especially the areas in western Colorado, are going to show an increase in population by 1970.

Q That's certainly possible, Governor, but under the present system, if they would reapportion as our constitution now states, they would of course again reapportion in 1970, would they not, and then they would gain their representation if they did have an increase?

A The people in 1970 will have an opportunity and a responsibility to apportion the State of Colorado in accordance with their views and in accordance with the necessity as they see it for reapportionment.

Q And also in accordance with our constitution, do you believe, Governor?

A In accordance with the constitution?

Q Yes.

A I don't know how the constitution will read in 1970.

Q And you believe that the people in 1960 have the same duty to reapportion with our constitution as it now stands?

A I think they have the same privilege, yes, sir.

MR. SALAZAR: No further questions.

JUDGE BREITENSTEIN: Mr. Bangert?

MR. BANGERT: No questions, Your Honor.

JUDGE BREITENSTEIN: Any other questions of this witness?

MR. KITCHEN: We have no further questions. Thank you very much, Governor.

JUDGE BREITENSTEIN: You are excused.

(Whereupon, the testimony of witnesses during this proceeding was concluded.)

REPORTER'S CERTIFICATE

I, Donna G. Spencer, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and did report in shorthand the proceedings in the foregoing matter;

Further, that I thereafter reduced that portion of my shorthand notes reflecting the testimony of the witnesses Little and Johnson to typewritten form, comprising the foregoing 49 page official transcript of testimony;

Further, that the foregoing official transcript of testimony is a true, accurate and complete record of the testimony of the witnesses Little and Johnson given during the proceedings set forth.

Dated at Denver, Colorado, this 27th day of May, 1963.

/s/ Donna G. Spencer

Donna G. Spencer

Certified Shorthand Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ARCHIE L. LISCO, et al,
Petitioners,

v.

STEPHEN L. R. McNICHOLS,
etc., et al,

Respondents.

and

WILLIAM E. MYRICK, et al,

Plaintiffs
and
Petitioners,

v.

THE FORTY-THIRD GENERAL
ASSEMBLY OF THE STATE OF
COLORADO, et al,

Respondents
and
Defendants.,

FEDERAL PLAN FOR APPOR-
TIONMENT, INC., et al

Intervenors.

CONSOLIDATED

Civil Action No. 7501

Civil Action No. 7637

OFFICIAL TRANSCRIPT

Testimony

VOLUME I

Morning Session

May 6, 1963

Proceedings had before the HONORABLE JEAN S. BREITENSTEIN, HONORABLE ALFRED A. ARRAJ, and HONORABLE WILLIAM E. DOYLE, in Courtroom A., Main Post Office Building, Denver, Colorado, beginning at 9:30 o'clock a.m., on the sixth day of May, 1963.

APPEARANCES:

GEORGE L. CREAMER, Attorney at Law, and
CHARLES GINSBERG, Attorney at Law, Denver, Colo-
rado, appearing for the Plaintiffs in case 7637.

FRANCIS R. SALAZAR and CARL HARTHUN,
Attorneys at Law, Denver, Colorado, appearing for the
Plaintiffs in case 7501.

ANTHONY F. ZARLENGO, and V. G. SEAVY, Jr.,
Attorneys at Law, Denver, Colorado, appearing for the
Defendants. Also Present: Duke Dunbar and Richard
Bangert.

RICHARD S. KITCHEN and HARLEY WILLIAMS,
Attorneys at Law, Denver, Colorado, appearing for
Intervenors.

CHARLES S. VIGIL, Attorney at Law, Denver, Colo-
rado, appearing for Defendants.

PHILIP J. CAROSELL, Attorney at Law, Denver,
Colorado, appearing as Amicus Curae.

WHEREUPON, during the progress of the hearing,
the following testimony was adduced:

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Defendants' Witnesses:

JAMES GRAFTON ROGERS

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1 through 12

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Received

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5

Defendants' Exhibits:

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STIPULATIONS

MR. SALAZAR: That procedure would certainly be agreeable, if it please this Court, that Mr. Creamer may proceed. If we see fit, we may supplement. There is one point. Mr. Lisco, who is our plaintiff, is present in order to establish our class. We have not inquired of the fact of the respondents if they would agree Mr. Lisco is representative of the class, as a taxpayer. If they would do so, we could allow him to lease, if so.

JUDGE BREITENSTEIN: You allege he is a resident citizen, taxpayer and voter of the City and County of Denver?

MR. SALAZAR: That is correct.

JUDGE BREITENSTEIN: It is my recollection the respondents deny that recollection and belief. What's the position now?

MR. ZARLENGO: As far as we are concerned, Your Honor, if counsel says he is, we will so stipulate.

MR. SALAZAR: He is, Your Honor. He is present.

JUDGE BREITENSTEIN: All right, it is stipulated then. That's part of the record.

JUDGE BREITENSTEIN: Very well, those objections will be noted and the exhibits will be received.

PLAINTIFFS' EXHIBITS 1 through
12 were received in evidence.

JUDGE BREITENSTEIN: Mr. Creamer, I meant to mention this earlier and overlooked it. In your complaint, you allege the residence, citizenship and capacity and what not of those, your plaintiffs. Those were all denied, as I recall, on information and belief.

MR. CREAMER: They were, but I think that matter was clarified by a stipulation rather similar to the stipulation that was made this morning concerning Mr. Lisco sometime during the previous proceedings.

JUDGE BREITENSTEIN: That's my recollection. I just wanted the record straight on that so there would be no question about their status.

MR. ZARLENGO: If there is any doubt about it, Your Honor, we will so stipulate.

JUDGE BREITENSTEIN: Very well.

MR. CREAMER: Thank you, Your Honor.

TESTIMONY

JAMES GRAFTON ROGERS

called as a witness by the Respondents, being first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

BY MR. ZARLENGO:

Q State your name, please?

A James Grafton Rogers.

Q Where do you reside, Mr. Rogers?

A Georgetown.

Q State of Colorado?

A Yes.

Q And you have been a resident of Georgetown how long?

A About twenty years?

Q And a resident of the State of Colorado how long?

A I was born in Colorado, and I was a resident here for about forty years, and then was away five or—about ten years, in New York and Connecticut, and then returned here.

Q Mr. Rogers, would you tell the Court about your educational background?

A I was born in Denver, educated first of all in the Denver public schools, then later at St. Paul School, Concord, New Hampshire. I graduated from Yale with a degree of Bachelor of Arts, and then was a newspaper reporter in New York for two or three years. Then studied law at the University of Denver and graduated in the University of Denver in law in 1908. In dealing with my educational background, I was Dean of the Law School of the University of Denver for about a year and taught there for about twenty years. I was afterwards Dean of the Law School of the University of Colorado, was absent there for two years as Assistant Secretary of State of the United States, returned there and went from there to Yale, where I was Master of one of the colleges at Yale, dealing with Government, taught in the Law School of Yale, and also taught government in the undergraduate and graduate schools of Yale. I resigned from Yale in 1942 and returned to the Government of the United States. I served in the Joint Staff for three years. I left there and went to New York, where I practiced international law, particularly international financial law, for ten years, and that led to my retirement from everything except nominal connection with various organizations. I have a number of honorary degrees.

Q Would you tell us about your honorary degrees, Dean Rogers?

A I have honorary degrees of Doctor of Laws from the University of Colorado, from the University of Denver, from the University of Columbia, from Yale and from the University of Pennsylvania.

Q You practiced law for a number of years also?

A I practiced law in Colorado for about twenty years initially.

Q When were you admitted to practice law in the State of Colorado?

A 1908.

Q Have you been admitted to practice law in any other states?

A Yes, New York, Connecticut and before the Federal courts, including the Supreme Court of the United States.

Q Dean Rogers, will you tell the Court about your experience in Government, either as a teacher or student of government or any other capacity?

A On graduation from law school, I was immediately appointed Assistant Attorney General of Colorado, and served for two years. I then went into private practice. I have taken a very active part in all sorts of governmental affairs, having served on a number of commissions and advisory boards in the City of Denver, also in Boulder and in Connecticut. I have been in a number of special assignments connected with the United States Government, most of them foreign, however, rather than local. I served as Assistant Secretary of State of the United States from 1931 to 1933, and then as I said before returned to the Government and served in the United States Joint Staff as chairman of a board on political problems and under-

group and intelligence and gorilla warfare in the Joint Staff for two years, nearly three years, at the end of the war. I have since then—my largest occupation has been dealing with foreign governments. I conducted negotiations on one topic or another for I suppose twenty or thirty nations in connection with the interests of the United States. I think that covers that.

Q Have you made a study of the history of Colorado? I want to get this podium where I don't block counsel. I wonder where would be the best place to put it? Is this all right?

MR. CREAMER: Fine.

A I have taken a very active interest in the history of Colorado from boyhood, and I have been very familiar with the geography and the physical conditions. My father was an engineer, and as a child he took me all over the state in connection with railroads and mining. My earliest recollections are connected with geography of the state. As regarding its history, I have never written any lengthy work in regard to Colorado history, but I have written a number of articles running in various magazines and various journals, scholastic journals, in regard to Colorado history. Since about 1930 I was elected a director of the State Historical Society, and took an active part in the State Historical Society until I left on the foreign jobs that I have referred to. When I returned to Colorado in 1950, I was elected President of the State Historical Society and for ten years following that devoted a large part of my time, perhaps a third or half my time, simply as a volunteer in that work, administering the affairs of the State Historical Society, its museums, various activities and lectures and so on. Three or four years ago I retired from that and am now Chairman of the Board of Directors of the State Historical Society.

Q What is the purpose and function of the State Historical Society?

A The State Historical Society is a very old institution founded in 1879 by a number of leaders of Colorado affairs. It is a branch of the state government. It is controlled by its own membership, but it is supported by appropriations of the state government. Its function has been to preserve, to study, to publish and in recent years to conduct a number of museums scattered through the state. We have eight or ten such museums outside the City of Denver, scattered all through the state, from Montrose in the far west—I am stating them because they indicate our familiarity with the state—from Montrose, Fort Garland in the San Luis Valley, a museum at Trinidad, a museum in the City of Pueblo, a museum called Fort Vasquez at Platteville, which is now under development, a museum at Leadville, one or two others.

Q I believe you have stated that you did teach government at Yale?

A I did.

Q For a number of years? Did you teach government anywhere else?

A No. Law, but not government.

Q I see, but you teach it?

A I have taught law in I suppose ten schools as a visiting lecturer and as well as a professor, including Oxford and Cambridge.

Q I see. When did you lecture at Oxford and Cambridge?

A One case in 1936, again in 1953, I think.

Q Dean Rogers, have you had occasion to testify in various courts in connection with either the history of Colorado, the water problems of Colorado, or anything of that kind?

A. No, not as a witness. I have tried a number of cases involving economic problems of Colorado. For many years I devoted myself almost wholly to the practice of water law and in the course of that tried cases representing Colorado interests in water particularly, but I can't remember ever being a witness.

Q So you are familiar with the water problems of Colorado. Are you familiar with the topography of the State of Colorado?

A Yes, I think so.

Q And the geography of the state?

A Yes, intimately.

Q Dean Rogers, would you state in general the topography of this state?

A Colorado is unique among American states in its complicated topography and in the division of the state into a large number of isolated sections divided by mountains, streams and canyons. There is no state in the Union except perhaps Philadelphia which even compares with the complicated geography of this state. We think often of the state as simply divided by the Continental Divide, but the fact is that the western three-fifths of the state is made up of a series of mountain ranges, which suggest little waves on the sea, one after another. Those mountain ranges have been the chief economic problem of Colorado from the beginning, and the conquest of the passes, the means of getting back and forth through the state, the means of communication through the state, have, as I see it, been next to water the major physical problem that the state has met. If you want me to go into a little more detail, I will do so, but that is the general statement.

Q Yes. Are you familiar with the reapportionment history of the state?

A Yes.

Q Will you tell the Court what the reapportionment history of the State of Colorado is?

A Yes. Let me state first that my familiarity with this is based on—what I know of it is based on two or three different sources. I took part in 1911 in a study for apportionment for the legislature when I was Assistant Attorney General. I also did some work in connection with apportionment at two other subsequent sessions of the legislature and have therefore been fairly conscious of it. My family has been so active in public affairs that I seem never to have been out of touch with this problem. Pursuant to the request of the State, I made over the last few months as detailed an examination as I could of the apportionment proceedings of the State. There is practically nothing available in print in regard to the motives of the legislature or to the discussions in the legislature in connection with apportionment. There are here and there some fragments. In recent years the legislature has made a rather methodical study of apportionment, and there have been some reports on that which have been available to me. The newspapers contain almost nothing about the detail of apportionment in the state. If they mention apportionment at all, it is very general. There has been almost nothing written on it of any value except some PHD theses and MA theses, three or four of which I have seen, but which contribute practically nothing in this regard.

Therefore, what knowledge I have of the apportionment history of the state is based, first of all, on some contact of the kind that I have stated on my own, and, secondly, on a great deal of contact with the legislative leaders, governors and that sort of thing, in the state, and, of course, are often discussing this problem, and, finally, on the examination that I have made of the history of apportionment as represented by the records, the official records, and anything that I can say in regard to it, in regard to the reasoning for it, for these apportionments, for the

districting of the state and for the motive behind it, is gathered from those sources.

It is possible, I think, in going over the history of apportionment in Colorado, to see conspicuously that the legislation reveals the problems that have troubled the legislature and reveals the kind of action they have taken on it, the apportionment.

I have the following general observations, if that's what you want me to describe. In the first place, there have been nine apportionments in Colorado since the organization of the state. The state was redistricted after every census except 1920 and 1940. Those two censuses did not alter much the shift in population in the state and a redistricting would have been relatively minor in any case.

Prior to the inauguration of the state in 1876, there were nine—there were three apportionments in the sixteen years of the territory, so that in the whole history of the state, from its territorial organization through its state organization, we have twelve apportionments, and let me say, because I am familiar with the history more or less that this is an unusual amount of activity in regard to redistricting a state. It is rare in the United States that so much action has been taken.

Q Have you prepared maps of the various apportionments?

A Yes. I have not maps of all of them. What I did was to pick out. This is very laborious, the working of these maps, and indeed it is very difficult to find the apportionments themselves. They are not indexed in any fashion that a lawyer thinks as comprehensible. The only way to do, and this I have done, is to go over page by page the statutes of Colorado from the inauguration of the territory in 1861 up to 1961, up to the last year or two. They are indexed in ways which sometimes are under "Constitution", sometimes under "Apportionment", sometimes under

"Reapportionment", and there is no way to follow it except page by page. The result is very laborious. I have, therefore not attempted to map all of the apportionments, but I have here maps of—

MR. ZARLENGO: Pardon me, Dean Rogers. I think the State has prepared some maps which I just received this morning. We would like to have them marked at this time.

THE COURT: Very well.

MR. ZARLENGO: Oh, you have the maps?

THE WITNESS: The State has given me copies of my maps which were my work maps. I have not had an opportunity to go over these in detail, but I have no doubt they are photographic reproductions of my own maps, and I have here my own maps which I will refer to myself.

JUDGE BREITENSTEIN: Maybe you better have these marked as exhibits, Mr. Zarlengo, before we start to refer to them so the record will be straight.

THE WITNESS: Now, how many do you want?

MR. ZARLENGO: One for each apportionment. Does Your Honor want a copy?

JUDGE BREITENSTEIN: Yes, it will be helpful if you have them. Have the other attorneys seen these?

MR. ZARLENGO: Yes, there were sufficient copies to go around.

DEFENDANTS' EXHIBITS E, E-1, E-2, E-3, E-4, E-5 and E-6 were marked for identification.

Q I hand you a group of maps that have been marked E, E-1, E-2, E-3, E-4, E-5 and E-6.

A I thought there were seven.

Q The first we marked E instead of E-1.

MR. CREAMER: Mr. Zarlengo, it is E through E-6?

MR. ZARLENGO: Yes, both inclusive.

Q Will you state what these maps represent?

A These seven maps represent a charting of the apportionment of the Senate, not of the House, made through the years between 1861, 1891, 1901, 1913, 1932 and 1953. Let me say in explanation this is not all of the apportionments. I tried to pick out the important ones, rather than cover them all. There are some apportionments which I did not include in my list which involved only one or two counties or three or four counties instead of the redistricting of the whole state, and those I have not counted at all as being apportionment. In other words, there is an awful lot of legislation in addition to this, but it is minor and these are the critical big factors.

MR. ZARLENGO: At this time we have copies for each of the judges and for counsel. Mr. Bangert, would you mind distributing them?

JUDGE BREITENSTEIN: Are you offering these exhibits in evidence?

MR. ZARLENGO: Yes, Your Honor, subject to examination by counsel, we would like to offer these.

MR. SALAZAR: If it please the Court, it was my understanding that counsel were to get copies.

MR. ZARLENGO: He is getting them.

JUDGE BREITENSTEIN: Just be patient for a minute, and I think we will get them to everybody.

MR. ZARLENGO: Mr. Bangert will have them there in just a moment.

Q (By Mr. Zarlengo) Dean Rogers, from your study of apportionment in Colorado, would you state whether

or not in your opinion there has been an attempt made to balance area and economic interest representations in the Senate?

MR. CREAMER: If it please the Court, may the question be repeated? I couldn't hear the last.

JUDGE BREITENSTEIN: Would you read the question back?

(The reporter read the pending question aloud.)

MR. CREAMER: If it please the Court, I would respectfully object to the question on the ground the problem whether there has been an endeavor to balance area and economic representation, whatever that may mean, is first singularly nebulous. Secondly, if the question is asked with reference to the exhibits submitted, and I trust it may have some connection with them, it would be impossible from the exhibit to say anything about it because there is no statistical data of any kind included on the exhibits—there are some boundaries—and thirdly, because the opinion whether or not there has been an attempt to balance area and economic considerations, whatever they may mean, is not germane to the issue in this action.

JUDGE BREITENSTEIN: Mr. Creamer, those objections will be noted. This is a trial to the Court. I think the points which you raise go more to the weight, which the Court will give to this type of testimony, than to legal admissibility. The objection is overruled.

MR. CAROSELL: May I observe for the Court, Your Honor, that Exhibit E, Amicus Curæ, Reapportionment of Colorado General Assembly, by the Colorado Legislative Council, covers substantially all of these maps, and so does the Colorado Year Book, which has been admitted into evidence? I only point out that these matters are corroborative, and indicate nothing more.

JUDGE BREITENSTEIN: Very well.

MR. ZARLENGO: Dean, do you still remember the question?

JUDGE BREITENSTEIN: Let's read the question again, please.

REPORTER: "Dean Rogers, from your study of apportionment in Colorado, would you state whether or not in your opinion there has been an attempt to balance area and economic interest representations in the Senate?"

MR. CAROSELL: May I ask how that's connected to these exhibits?

JUDGE BREITENSTEIN: Are you making an objection? If so, your status here is such I don't see how you can make objections for the record.

MR. CAROSELL: No, no, you are permitted to appear here, Mr. Carosell, by the permission of the Court, and we are willing to receive the exhibits which you have, but so far as the objections to testimony are concerned, I think we will have to confine those to the objections of the attorneys of the parties.

THE WITNESS: Want me to answer?

Q (By Mr. Zarlengo) Do you have in mind the question, Dean?

A Yes, I think that the record shows that throughout the history there has been an effort to take into consideration the factors you mentioned, and a number of others.

Q What other factors were taken into consideration?

A Population, of course, because that was the fundamental basis for it, but population up to the date of the present amendment was considered in connection with the terms of the constitution, which did not require a representation by count of heads. Do you want me to continue?

Q Yes, if you would.

A The constitution of Colorado provides for a formula for the distribution of the senatorial and representative offices. It provides under what is sometimes called the Elihu Root or Pennsylvania conception of policy, that the legislature in arriving at a distribution of the Senate and the House shall first of all establish what the constitution calls a ratio, and that ratio as interpreted by our legislature and also with the approval of our courts has meant that in connection with population there should be a formula set up under which the allocation of senators and representatives should be based on the number of senators or representatives in any given district. In other words, roughly speaking, the legislature throughout its history up to the present amendment has in each case of apportionment either set up or maintained a ratio already set up from a previous time which provided that roughly speaking—I am generalizing very widely—"X" number of voters, "X" number of population, should entitle a district to one senator and a larger number, normally about two "X", should provide for second and subsequent senators.

The legislature also included another conception, which was that if a district had one "X" population, but not two "X", that it could be entitled to a second senator for something like one and a half "X", and that formula, that method of calculation, which seems to have been never contested and universally accepted, resulted through the years in the legislature for each apportionment adopting a formula of that character.

Therefore, the effort to meet a per capita, per head, standard, a numerical head, was never assumed in the legislature from 1876 to 1962.

There is nothing novel in this in Colorado. This is today in one form or another a principle which the vast majority of the states have followed since about 1850. Initially, most of the states started out to distribute their legislature on the basis of a count of heads. There were

two or three states which did not have bicameral legislatures originally, but those two or three abandoned the unicameral legislature and adopted the bicameral one and there is now only one state in the Union, Nebraska, which has a unicameral legislature.

They started out, most of the states, with the idea of distributing the legislature on the basis of a count of heads. Beginning with about 1850, there was a change, in that, and one legislature after another, one constitution after another, adopted a principle that the small communities should have a larger representation than the heavily populated areas.

It took various forms, and that among the students of American government is known as the Elihu Root or Pennsylvania conception of distribution.

Q Is that what is known as the ratio system?

A No, it is often areal instead of ratio.

Q Areal?

A Yes. For example, if this is important, New York, Pennsylvania, Rhode Island, among conspicuous states, have had provisions that no one county or city should have a larger representation than the small limit. For example, three senators, or something of that kind. That rule prevails today in New York. It has prevailed in the majority of the states in the Union in one form or another.

Some of the states have adopted what is called an areal principle, providing that no one area, as I have said, should have more than a certain amount of representation. Others have adopted a ratio system of the kind that I have described here, that is not based on area, but based on weighting population.

Q What system was in effect in Colorado?

A The ratio system.

Q And what was the effect of the ratio system insofar as giving representation to less populous counties?

A Well, as I tried to say before, and I will try to state again, the effect of the ratio system is to give a small community more representation than the densely populated communities. As applied in Colorado, this was not—this did not have the effect of militating against Denver exclusively. In almost all of the applications of this ratio system which occurred, there were other counties outside of Denver which suffered more in the way of reduction of representation by the fact that they were heavily populated, but basically it was aimed at the idea that the heavily populated communities were dangerous if they were given the same representation that the less populated communities were given.

Q What effect did it have in the way of giving representation to various economic interests, mining communities and so forth?

A That would fall outside of that. Throughout, it is evident, as I tried to say before, that the legislature was interested in dealing with economic problems, the peculiar economic interests of the various parts of the community, such, for example, as mining and farming, and also it gave attention to social background. For example, the communities with heavy Mexican population were grouped together in some form or in various ways dealt with.

In addition to that, I would think that the fourth big factor that appears in the acts of the legislature is the geographical factor. They have throughout their history tended to favor in representation the mountain counties, and have experimented over and over again with an effort to try to tie together mountain counties which had means of communication and common economic interests, and were not divided in a way in which they couldn't be reached.

If I may illustrate, I realize these are generalizations and a little hard to follow. For example, in many communities which are contiguous, there is almost no actual traffic because mountain ranges and valleys and canyons—they have tried to tie together communities, not only which had a common economic interest, a common social background, but which could be united in a fashion in which a representative or a senator was able to reach his people, and in addition to that another factor appears continuously through this history, which is the—what the legislature seemed to think was a disastrous result in tying together a big county and a little county because if they put a big county in a group with several little counties, it practically denied representation to the little counties because the only senator or representative that would be elected would be someone known to the big county and usually a resident. Those are the factors I am most conscious of.

Q By big county, you mean one that has a more populous—

A Correct. I mean not in area, but in population.

Q Are you familiar with Amendment Number 7 that is under discussion here today?

A Yes.

Q Have you made a study of that amendment?

A Yes.

Q Will you state, Dean Rogers, whether or not in your opinion Amendment Number 7 insofar as it pertains to the apportionment of the Senate has a rational basis considering the historical, economical, social and geographical and topographical background of the state?

A Yes, if rational means reasoned in the sense of having it a historical, economic, social, geographic or a similar series of factors, I think that the distribution in the

Amendment Number 7, in the Federal amendment, includes consideration and recent consideration of all those factors.

MR. ZARLENGO: That's all we have, Your Honor. Your Honor, I have offered and I reoffer, subject to examination of counsel, these exhibits, E through E-6.

JUDGE BREITENSTEIN: Are there any objections to Exhibits E through E-6?

MR. CREAMER: No objection.

JUDGE BREITENSTEIN: Those exhibits will be received in evidence.

DEFENDANTS' EXHIBITS E through E-6 were received in evidence.

JUDGE BREITENSTEIN: At this time the Court will take a ten minute recess. Court will be in recess for ten minutes.

(The Court recessed from 10:40 o'clock a.m. until 10:50 o'clock a.m.)

JUDGE BREITENSTEIN: Mr. Zarlengo, had you concluded your examination of this witness?

MR. ZARLENGO: Yes, Your Honor.

JUDGE BREITENSTEIN: Is there any cross examination?

MR. CREAMER: Yes, Your Honor.

JUDGE BREITENSTEIN: Very well, proceed.

CROSS EXAMINATION

BY MR. CREAMER:

Q Dean Rogers, with relation to the exhibits which have been marked E-1 through E-7, I will call your attention to the first of those, which has been marked E-1, and relates to an 1881 apportionment.

JUDGE BREITENSTEIN: Pardon me, it was my understanding that that was marked E.

MR. CREAMER: Oh, E; I guess that's right. It is E and then E-1.

JUDGE BREITENSTEIN: Yes, I think the 1881 is E.

MR. CREAMER: It is E and the others are E-1 through 6.

JUDGE BREITENSTEIN: I just wanted the record straight.

MR. CREAMER: Thank you.

Q With relation then to the first of them, E, which is the 1881 apportionment, you will note on that map the tier of counties to the east, being from north to south, Weld, Arapahoe, Elbert, Bent and Las Animas, it is it not that between 1881 and 1891, represented by E-1, the next map, that entire eastern tier of counties was subdivided into a much larger number of counties, is that correct?

A Yes.

Q So that the county units themselves, as they presently exist have been materially changed by legislative action and during the apportionment history you have mentioned, is that correct?

A That's correct. The counties, of course, have been constantly changed, I have a map here showing the historical progression of them.

Q Yes, that has been a pronounced feature of Colorado arrangements. We have changed boundaries of counties from time to time as administrative conveniences have required, is that not so?

A Yes, Mr. Creamer, up to I think the year 1913. There have been no changes since 1913, according to my recollection.

Q I believe you are essentially correct in that.

A Yes, the last change was in 1913, with the I think establishment of Alamosa County, that's correct.

Q And those several changes in boundaries are reflected on your maps, E, E-1, E-2 and E-3 and E-4, is that correct?

A Yes.

Q Now, Dean Rogers, you have concerned yourself in the preparation of these maps and in your testimony have primarily discussed the Senate of the State of Colorado?

A Correct.

Q Rather than the Senate and House, and on Mr. Zarlengo's examination you made some reference to the constitutional basis for apportionment of the legislature and explained your view of the ratio matter and its relation to the Pennsylvania matter. The constitutional provision during the whole of the period covered by the several maps in your E series was Article 5, Section 45, providing that the General Assembly shall provide by law for an enumeration of the inhabitants of the state in the year of Our Lord 1885 and every tenth year thereafter, and at the session next following such enumeration and also at the session next following an enumeration made by the United States, shall devise and adjust the apportionment, the ratio to be fixed in the Senate by law. That is the provision to which you had reference?

A Yes, sir.

Q Dean Rogers, is there in your opinion and to your knowledge, and has there been at any time during the periods covered by your exhibits in the E series, any differ-

entiation made by the Colorado constitution as to the formula to be used for apportionment of the House of Representatives and the formula and basis to be used for the Senate of the State of Colorado?

A I don't think I understand the question. I am sorry.

Q Constitutionally, has there been during the period covered by your maps any difference made, any distinction in the constitution, between the method of apportionment prescribed for the Senate and that prescribed for the House?

A None between the Senate and House. The same rule applied to both of them up to the adoption.

Q Of Amendment 7?

A This Amendment 7.

Q Then in your opinion during the whole of the period that we have had involved up to Amendment 7, would there have been any basis constitutionally, any historical or other basis, for a differentiation in the mode of prescribing membership for House and for the Senate?

A The fact that the Senate is elected for four years while the House only for two might be a factor that would affect the legislature in making an apportionment. That's the only one that occurs to me.

Q Yes, now, you have stated when asked by counsel to relate the historical factors relative to the Senate, and I think I quote reasonably accurately, population, of course, for that is the fundamental basis of it, and then you proceeded to set forth several other factors. I take it then that population is in your opinion historically a necessary—one of the necessary, at least, determinants for the Senate apportionment?

A Yes, the constitution so provides.

Q Yes, in fact, the constitution doesn't really provide anything else, does it?

A No.

Q Very well, Now, do you consider then that population is presently one of the factors which ought to be considered in the apportionment of membership to the several constituent Senate districts?

A The effect of Amendment 7 is to wipe out the previous constitutional provisions which included recognition of population and also ratio. Therefore, at the present time—I am speaking now as a lawyer—at the present time, the people have amended the constitution to a point where they do not require a distribution of population for the Senate.

Q Yes, and under Amendment 7, though population you state historically has always been the first of requisites, population has been eliminated entirely as a requisite, is that correct?

A Under Amendment 7 for the Senate?

Q Yes?

A As contrasted with the House.

Q There has in fact simply been a taking of the pre-existing Senate districts, with one minor variation of translation of the counties, cities, as I remember, and then an addition of four members and a freezing of the districts, is that correct?

A Yes.

Q And this does not have any necessary relation to the population presently and certainly none in the future, is that correct?

A Amendment 7 removes the mandate to consider population in the hands of the legislature.

Q Very well, but it is your testimony—

A Now, of course, that doesn't mean—let's be realistic about it. That doesn't mean Amendment 7 doesn't consider population, because under the Senate, and the Senate as provided in Amendment 7, has taken into consideration, population in the distribution.

Q The Senate, as provided in Amendment 7, simply froze the 1953 distribution, did it not, and added four senators?

A Correct, with slight changes.

Q Now, Dean Rogers, are you able to give us in your opinion, because the last question asked concerned that, any historical reason why the county of Las Animas should have one senator representing 19,983 persons and the county of Pueblo, immediately to the north thereof, should have two senators representing 118,000 persons, or approximately 59,000 represented by each senator, as compared to Las Animas' 19,000? Is there a historical basis for a three to one differential in favor of Las Animas, in your opinion?

A There is a historical reason for the recognition of Las Animas County as a unit. Las Animas County, from the beginning of Colorado history, was a very individual county and throughout its history, with one possible exception, Las Animas has had its own senator.

Q Las Animas County, as a matter of fact, in its inception was an area which included Las Animas and Baca Counties and was subdivided into two counties, is that not true?

A That's true, and as a matter of fact, it—yes, it covered Baca. Yes, Baca, and Las Anamis. Of course, there is nobody lives in Baca.

Q There is hardly anyone who lives in Las Animas, is there? I do ask you seriously can you give us any reason

why a citizen and resident of Las Animas County is entitled to three and one half times the voting strength of his neighbor immediately to the north in Pueblo County?

A Of course, Las Animas County, you have picked out because by a slight margin it is the county most favored in regard to senatorial representation. The margin is very slight.

Q The margin between 19,000 per representative and 59,353 I do not find slight, and I selected it, Dean Rogers, not because it is a slight margin, but because I am asking you whether you can give us a rational basis for a three to one deviation as against Las Animas as against Pueblo immediately adjoining it, there not being as I remember any superficial boundary which divides Pueblo from Las Animas?

A What I was trying to suggest is that while Las Animas happens to represent a population of 19,900 for one senator, the other representation in other counties is equally discriminatory in that sense. For example, District 24, which includes the county in which I live, with Gilpin, Clear Creek, Park, Teller and Douglas County, is given a senator for 20,909, which is almost the same as Las Animas.

Q Yes, I think that's a very interesting point. Can you give me any historical or rational basis why Chaffee, Park, Gilpin, Clear Creek, Douglas and Teller should have for 20,909 persons one senator, when the county of Jefferson, immediately adjoining them has for one senator a population of 63,760?

A Yes, historically there are reasons for both. As I have stated, in the case of Las Animas, Las Animas County has from the beginning been treated as a unit. Now, if I may explain. There are some counties in Colorado with this history. Originally, Weld County, Larimer County, Las Animas County and Boulder County, for

example, were all highly organized individual counties with a certain character to them, which led to an effort to give them separate representation, and I count Las Animas County in that field, and, indeed, Weld County is also favored in the sense of representation, because it has three senators, each one of whom only represents 35,000 people.

In the case of Larimer in this particular allocation that isn't so striking, but it is still favored.

Now, the reason for the other group of counties is different historically, and what I am trying to do is interpret what it seems to me the legislature has been concerned with. When it comes to the little mountain counties, little in terms of population, the legislature has tried to give representation in the first place to their geographical problems, and in the second place to their economic interests, and all of the mountain counties, all of the counties in the western three-fifths of the state, speaking roughly, have been given very favorable treatment as regards the per capita measurement of representation, but it is scattered. For example, the legislature has recognized obviously that the prairie counties, Kit Carson, Elbert, Lincoln, Cheyenne, and Kiowa, which have small populations, have large area and a special type of agriculture, which is different from the river valleys, were entitled to representation for that sort of interest, and there are similar factors. I don't cover this too greatly.

Q Is there any possible basis you can give us which determines how much representation each of these interests is entitled to? Is there any formula, in other words, by which you determine how much the representative predominance of a dry land farm community must be over a wet land or irrigated farm community? How much you determine such a community must be predominated over by a mining community? How much the population of a city must be dominated either by one of these farming

communities or by a mining community? What is the measure by which you equate these several economic interests?

A I do not know.

Q Is there any?

A I think that the representation of outright count of heads of population has been overruled in the legislative mind and in the drafters of this amendment, who were not the legislature, by geographical and economic and other factors which the state has always considered and other states have considered.

Q In other words, it is your testimony that though the constitution of the State of Colorado has historically contained nothing but a population statement historically, the legislature has ignored that matter and the matter of its ignoring it has now been concretized in the form of Amendment Number 7, which formally and absolutely denies population in the Senate, is that correct?

A No.

Q Where am I mistaken in my formulation of the question?

A You are mistaken in the statement, Mr. Counselor, that the constitution of the state required a distribution on the basis of per capita count. It does not.

Q Do you find anywhere in the constitution a justification for a discrimination between the Senate and the House in modality of representation?

A Not under the constitution.

Q Do you find anywhere in the constitution a statement for differentiation between dry land farms and river bottoms?

A The constitution does not state all of the factors that need to be taken into consideration. The constitution

states certain limits on the freedom of the legislature to consider all sorts of factors, geographical, economic, social and historical. It is simply a limitation on the power of the legislature in which they say you must not go beyond these factors; these factors being, first of all, population, and, second, a ratio system, under which the factor of population is greatly tempered and altered.

Q Dean Rogers, you include in your series E exhibits as E-5 a 1932 apportionment. Is that a legislative apportionment? It is next to the last of the series of maps.

A One of the apportionments is an initiated measure and I am just fumbling to remember which one it is.

Q 1932, I think.

A '32. I will check it in a minute.

Q It was an initiated measure, but I wondered if your map reflected that or the legislative one?

A No, the 1932 was an initiated amendment apportionment.

Q There was a legislative one made in that same period, was there not?

A The legislature in 1933 passed another apportionment, varying from the 1932 apportionment.

Q And it was declared unconstitutional and invalid and void?

A Correct.

Q Very well. Dean Rogers, it is a fact, is it not, that the history of the mountain mining communities from the height of their prosperity in the '80's to the present time has been a continuing history of relative loss of population?

A Yes.

Q It is a fact, I believe, that Georgetown, in which you are presently a resident, was at one time a community of approximately fifteen to twenty thousand persons, is it not?

A Not as large as that. I think somewhere between five and ten thousand.

Q Central City, which now has some 300 persons, was a community of a number of thousands, was it not?

A Correct.

Q And this was true also of a great number of communities in the mountain area?

A Right.

Q And these communities have in some cases wholly and in others largely physically disappeared with the passing from the scene of the mining industry, is that correct?

A They have shrunken vastly.

Q And there has—

A Of course, they now have become recreation communities. They are no longer mining communities.

Q I think that is true. Do I gather then that they are to be read as recreation centers, and I believe that there has been a similar movement of population out of farm areas generally and into the larger cities in the state, is that correct?

A There is very little falling off in population in the river valleys which make the irrigated farming area. There is some reduction, but it isn't very substantial. There was a very much larger population in the eastern dry land counties than there is now.

Q Yes, now, as I understand it, one of your statements in examination by counsel was that it is a belief of the persons advocating population on the Pennsylvania

basis, as I understand it, that heavily populated areas are dangerous, if given equal representations. May I ask to whom they are dangerous?

A Dangerous to the welfare of the state. Elihu Root, who is the most famous and best known spokesman of this point of view, said in the conferences for the New York constitution in the 1890's, I think in 1894, that the heavily populated areas should not be represented as generously as the rural areas, because the cities from their very fact of population could organize in a way in which they had much greater strength. They were subject to political machines, subject to the activities of chambers of commerce and various other organizations, elements which were not applicable to rural areas, and he therefore carried successfully an amendment to the proposed constitution of New York which limited the representation of the big cities.

Q Déan Rogers, do I understand it that there is not, in your opinion, a possibility of successful rural political organization in a state such as Colorado?

A Well, I hardly know how to answer. Most of the striking organization of Colorado which has occurred, the political organization, which has influenced the state, has centered around Denver. The corrupt Big Mint organization here fifty or sixty years ago, which influenced Federal politics, the action of the Ku Klux Klan, which made the most troublesome, the darkest period, in Colorado history, centered around Denver. I am not conscious of any movement, organized movement, of any importance, that has occurred in Colorado that was truly rural.

Q You have made mention of the fact that there is a danger in the influence by chambers of commerce. Is there a lesser danger in influence by the Cattlemen's Association of Colorado, which I think is not inactive on most occasions, or is there a lesser danger in the mining associa-

tions or is there a lesser danger in the Farmers Union, or in the Grange, or in any of the other multiple agricultural organizations that exist, if you consider it a danger?

A I think the history has shown throughout the United States that many of the more turbulent hours, many of the more turbulent events, have originated in the cities, rather than in the country. In Colorado, the cattle organizations, the water organizations, have both been rural, of course, and they both have played a part in Colorado politics, but it is not a very conspicuous part in my judgment.

Q Perhaps not conspicuous, but weighty, Dean, very weighty. In the circumstances you detail, I take it that you consider that it is a positive good then that the major segments of the population not be able to express itself legislatively, and that a braking mechanism of some kind, be kept upon it by a minor portion of the population?

A That is my own opinion.

Q Yes, and it is this purpose which is fundamentally sought to be carried out by Amendment Number 7, namely the prevention of the majority of the population controlling as a majority the legislature of the state?

A No, I should think Amendment Number 7 had quite a different, indeed almost an opposite, purpose. The purpose of the amendment, of the drafters of the amendment, in my judgment, was to recognize the growing population of the suburban counties around Denver, the metropolitan area. Denver itself was quite adequately represented and it is in here. We hear a great deal about complaints by Denver of representation, and sometimes it has been militated against, but it has grown steadily in legislation. The purpose of Amendment 7 again, as near as I can judge from the spokesmen and from the character, was to recognize the growing and legitimate demands of the suburb areas around Denver for representation and outside of that not to disturb the existing allocation of power in the state.

Q I see, so that what we are dealing with is a power allocation?

A Oh, yes.

Q Yes, and it was desired in drafting Amendment 7 not to disturb the existing allocation of power essentially, is that correct?

A Amendment Number 7 adopts the existing allocation of power, modifying it by giving new representation to the metropolitan area of Denver.

Q Yes, and so we adopt an existing allocation in which Las Animas has 19,000 people represented by a senator and Denver 61,000 represented by a senator, and Denver on this three to one basis is adequately represented, I believe you have stated, is that correct?

A Well, numerically, the distribution, the average distribution in the state, at the present time with our given number of senators is about 45,000 as I recollect it to a senator. Do I make myself clear as to what I mean?

Q You do.

A The average, therefore—Denver with a representation under Amendment 7 of 61,000 gets less than the average representation, but it is not very far from the average.

Q Yes, and then we have District 24, your own district, Chaffee, Park, Gilpin, Clear Creek, Douglas and Teller, which has one person or one senator for 20,000. That's two and a half times what it is supposed to have on your 45,000 credited, is it not?

A That's correct.

Q And Fremont and Custer get a senator, but they have only 21,000. Is that correct?

A Yes, you can go on for—

Q And Delta, Gunnison and Hinsdale get one, but they have only 21,000, and Rio Blanco and Moffat and Routt and Jackson and Grand, with 23,000. In fact, practically every one of these mountain counties has at least two and one half times and some have three and one half what population would give them, is that not correct?

A That's correct. Not all of them, but many of them.

Q Yes, and the amendment further freezes the Senate districting so that nothing will change them, no matter how much more population there is, is that correct?

A The legislature could not change them, but our people are very active in initiating them.

Q You mean they could reamend the constitution again sometime?

A As we do almost every election.

Q We have never amended this provision. From the period of the state's history down, it has just been ignored by the legislature instead, is that correct?

A That's correct.

MR. CREAMER: And that was salutary. I think no further questions, Dean, thank you.

JUDGE BREITENSTEIN: Any other cross examination?

MR. SALAZAR: We have none, Your Honor, thank you.

MR. KITCHEN: If it please the Court?

JUDGE BREITENSTEIN: Mr. Kitchen.

FURTHER CROSS EXAMINATION

BY MR. KITCHEN:

Q With regard to one or two questions, Dean Rogers, which were asked, I am not sure that the words of the present constitution were called—or the former constitu-

tion prior to the present amendment—were called to your attention. Is it not true that the former words of the constitution included the word, "ratios", plural?

A Correct.

Q Is that not a basis which might be considered as two different or one or more ratios for the House and Senate?

A Yes, I see no reason that under the constitution why it could not have been a different ratio applied to the House and the Senate, because in fact there always was a different one. Each one of the apportionment acts contains a ratio for senators and another ratio for representatives.

Q That was the interpretation placed on the constitution continuously by the legislature, is that correct?

A Correct.

Q In your opinion, is representation in the State of Colorado by the application of any strict mathematical formula practical or desirable?

A I should think it would be disastrous.

Q I should like to ask you, if you would, to explain for us, sir, some of the markings upon your exhibits. I was not able to examine these prior to the trial, and ask you if you would very briefly explain to us and to the Court what the shadings are on the map series of exhibits?

A I should have said something about that before. These exhibits are a little difficult to understand because in the number of the apportionments a single county would be included in two or three different legislative districts. For example, County X would have a senator of its own, another senator combined with County Y and another senator combined with County Z, and at least in one case there were four such allocations, which are very difficult to rep-

resent on a map. My own maps here use color and make them clearer, my working maps. The result is that the shading which occurs in these copies of the maps do as near as I can make out follow the original working maps, but they marked them in a different fashion.

Now, roughly speaking, to illustrate, to get a good example, in the apportionment of 1891, Park County is combined with Chaffee County for one post and with Lake County for another. The legislature evidently found as time went on that there was great dissatisfaction with that, because the apportionments would show they would adopt it at one period and repeal it quite promptly at the next one.

Therefore, these maps, by shading, are intended to indicate that sort of combination. Let me get a map that represents that, that combination, by a difference in shading on the maps. There is nothing on the maps intended to represent anything except the distribution of senators and representatives.

Q I see.

A Really this little factor that I am talking about is not important because it doesn't occur in modern apportionments. It is the old apportionments which have been set aside.

Q In 1913 then the legislature went to single member districts, is that correct?

A That's correct.

Q And single member districts have been maintained?

JUDGE BREITENSTEIN: Wait a minute. I don't understand. You mean since 1913 on, each district had one member?

MR. KITCHEN: No, what I mean to ask, there was no overlapping of senatorial districts after 1913.

A That's right, they didn't—there was no grouping of counties into different districts.

Q All right.

A They tried it at least twice, maybe three times, and each time they would come back and repeal it.

Q Now—

A Of course, a factor in here undoubtedly, and again I am just simply interpreting as what you would gather to be the reasons and motives of the legislature, a factor is when a county with a considerable population is grouped for purposes of representation with a little county, it practically wipes out the representation of the little county, and that has been a constant course of controversy.

Q All right: Mr. Rogers, the last change shown by your exhibits in the senatorial districts, that is the boundaries of the districts, was made in 1932, is that correct?

A I can't answer that offhand. It involves—of course, the apportionment of '53 was mainly adding to the existing representation in the same—roughly the same—districting that occurred before.

Q Yes. As I look at your exhibits, sir, the 1913 apportionment in the Senate as to district boundaries, Lake and Chaffee Counties were together?

A Correct.

Q And that was changed by the people in 1932, is that correct, sir?

A Yes.

Q Summit County was also changed?

A Correct.

Q In 1932 the people transferred Chaffee County to the district with Park and Teller and transferred Lake County to a district including Summit, Garfield and Pitkin. The legislature has not changed the boundaries of the senatorial districts as so established by the people in 1932, is that correct, sir?

A I think that is correct.

JUDGE BREITENSTEIN: Well, now, just a minute. I have been looking at this map and if I understand it correctly, Morgan County at one time was with Washington and Yuma and in 1953 it went in with Adams. In 1932, Douglas with Jefferson and 1953 with Gilpin, Clear Creek, Park and Teller. Is that what he testified?

MR. KITCHEN: I thought he testified that they had not been changed and I think there is a change that should be reflected.

THE WITNESS: You are asking me too much detail for me to answer offhand.

Q All right, the people established these districts in 1932 and those were changed by the legislature in 1953 in some details, is that correct?

A Right.

Q Now, you testified that Amendment Number 7 does take into account in your opinion population, is that correct, sir?

A Yes.

Q And you stated that that was by adding representation to the metropolitan counties surrounding Denver. Was there any change reflecting population made by Amendment Number 7?

A There is one transfer under Amendment Number 7 of one of the counties which we have referred to. I haven't got the text here before me.

Q Well, that added Elbert County—

A Shifted Elbert County from one district to another.

Q Was that not another change which affected the power distribution of population?

A Yes, they increased the number of the Senate by four.

Q And how about the House of Representatives?

A Remained the same number.

Q Same number of representatives, but it was placed on a straight population basis, was it not?

A It was. The ratio principle was removed.

Q So that under Amendment 7, the House of Representatives must reflect a straight population basis, is that correct?

A Correct.

Q Isn't it true, Mr. Rogers, that Amendment 7 has totally shifted the control of the legislature from the rural areas of the state to the urban areas of the state?

A Well, it depends upon how you define rural and urban.

JUDGE BREITENSTEIN: I was just going to suggest, Mr. Kitchen, that even if he answered that question, I wouldn't have understood his answer because you have got a lot of definitions of urban. As I recall the census, it is any place more than 2,500 people. How can you answer the question that way on the basis of the comparisons made thus far.

MR. KITCHEN: Well, that was the only way the question was asked on cross examination, Your Honor. I was just taking it up from there.

MR. CREAMER: I am sorry, the question was not asked at all on cross examination, and I specifically do object to that reference.

Q Well, how would you define the metropolitan areas of the State of Colorado, Mr. Rogers?

A Well, it would all depend on the purpose of my definition. However, speaking roughly in terms of density of population, it is obvious that the dense populations are in Denver, Boulder, Jefferson, Arapahoe, El Paso and Pueblo Counties.

JUDGE BREITENSTEIN: Mr. Kitchen, I do not mean to interrupt or cause any difficulty here, but it is my understanding that the United States Census Bureau has a method of determining metropolitan areas. If that term is going to be widely used in this record, it seems to me that some reference should be made to the census definition.

MR. KITCHEN: Well, Your Honor, there are—

JUDGE BREITENSTEIN: In other words, we have every witness giving his own ideas as to what a metropolitan area is. It seems to me we will have a lot of confusion.

MR. KITCHEN: Yes. I think that we were discussing this one time before. I believe at the hearing last summer, Your Honor, and we were at that time referring to the maps as shown on page 7-18 of the Exhibit, which I believe is Petitioner's Exhibit 1, is it not?

MR. CREAMER: I think it is, yes.

JUDGE BREITENSTEIN: Has the United States Census Bureau defined a metropolitan area here in Colorado?

MR. KITCHEN: Yes, Your Honor, at least within this context we were referring to that map which showed on that page the darkened areas of Boulder—

JUDGE BREITENSTEIN: I do not mean to influence your examination, but it seems to me since there had been reference, as I recall, to three metropolitan areas here in Colorado, if we are going to keep the record understandable we ought to have some consistent use of terms.

MR. KITCHEN: I agree, Your Honor, and apologize for the confusion.

Q I should like to refer then, if the Court please, to page 7-18 of Petitioner's Exhibit 1, which is the United States Census population of 1960, and which describes according to the Census Bureau three different metropolitan centers which are substantially as you have indicated, Mr. Rogers, is that right?

A Yes, this conforms to my answer to you as to the standard metropolitan statistical area, places of 25,000 or more. This is for the purpose of gathering a particular type of statistic in the city area.

Q All right, now, prior to the adoption of Amendment 7, did any one or any combination of these metropolitan statistical areas referred to have control of either house of the Colorado legislature in numbers?

A I have not calculated that.

Q If these areas include approximately two-thirds of the people of the State of Colorado, then would you expect that under Amendment 7 they would control approximately two-thirds of the House of Representatives, under Amendment 7?

A Yes.

Q And isn't it also true that under Amendment 7 there are allocated to these counties set forth in that exhibit a total of eight senators to Denver, eight to the surrounding counties of Boulder, Jefferson, Arapahoe and Adams, two to El Paso and two to Pueblo, for a total of twenty of the thirty-nine senators?

A That's correct, computation—

Q And, therefore, is it not the political result of Amendment 7 that the metropolitan areas of the State of Colorado will have majority control of both houses of the legislature?

MR. CREAMER: If it please the Court, the problem of political result, I think, goes far beyond any propriety in question here.

JUDGE BREITENSTEIN: Yes.

MR. CREAMER: We have a tabulation.

JUDGE BREITENSTEIN: Yes, I am bothered with my question, Mr. Kitchen, because it is quite obvious from the statement that twenty is more than half of thirty-nine.

MR. KITCHEN: Thank you.

THE WITNESS: I was about to say that.

Q Thank you. Now, you have testified with regard to your background on water law, Mr. Rogers. Now, I would appreciate it if briefly you would relate the water problems of the State of Colorado to the legislative problems which are faced by the Colorado legislature?

A Yes, I will try to. There is, in the first place, an almost wholly different phase of water problem west of the Divide, the Continental Divide, as against the area east of the Continental Divide, speaking roughly. West of the Continental Divide, the problem of water, which is along with geography one of the two critical problems of the state—west of the Continental Divide, speaking roughly, there is a good deal of water, but very little land suitable for irrigation agriculture. The result is that the areas east of the Continental Divide have been from a very early date gradually diverting water from the west side of the Divide to the eastern side.

There are a large number of small diversion ditches dating back to 1870 and '80, which carry water from the west side to the east side, supplementing the flow of water on the east side. The result is that the western part of the state has a conflict of interest with the eastern part of the state, which is represented by the present distribution.

For example, of the four representatives in Congress, the Western District has a population only of a half or a third of the two districts—of the three districts east of the Continental Divide, and the reason is that it is clear that it has survived for a long time that in spite of the fact that the representative from the western slope speaks for a much smaller number of people. I have never heard a protest against the existence of that situation. The people recognize there is a conflict that ought to be treated as an element in our lives.

Now, east of the Continental Divide there has always been a water shortage. We have very heavy irrigation in the valleys of the Platte and the Arkansas, irrigation which produces crops which are completely different from the crops in the dry land areas, and different from the characteristic crops on the western slope.

Speaking broadly, or roughly, there is no general farming on the western slope at all, very little of it. There is considerable fruit growing on the north fork of the Gunnison and on the Colorado River, but general farming of the type that we have recognized as such in the Arkansas Valley and in the Platte Valley is almost unknown. The people's lives are very different.

On the eastern slope we have a problem of providing for representation, for spokespersonship between two very different kinds of agriculture, and including in agriculture cattle raising. Deep in the Arkansas Valley and close to the river and in the Platte Valley, we have a rich productive farming, supported by constant fertilization in which

the critical element all the time is the flow of ditches, which have produced wealthy communities that are very stable. It is markedly true in the Platte Valley and it is only a little less true in the Arkansas Valley.

Now, the interests of those people and their character is very different from the inhabitants of the prairie country in eastern Colorado, or of the cattle country in north-western Colorado. There is a great deal of change of population in those areas. I have been interesting myself for two or three years by indexing the towns, the streams, the villages of Colorado, through their history. One of the most striking things is that the turnover in population on the prairies in the east is greater than the turnover in population in the mining areas. The towns rise and vanish in the dry land areas. Their interest is—their only interest in water is a place where you can water cattle in the prairie areas. They have none of the preoccupation with problems of water, of water distribution, and of the defense of Colorado water against the lower states which claim our streams. Means nothing to them. They go through cycles of great production in wheat and fodder crops and then it disappears and the towns vanish.

The consequence is, and this is what I think you were asking me to say something about—the consequence is that the representation of the river valleys in the east is very different from the representation, the proper representation, of the prairie areas in the east, and the representation of the western slope is very different in its problems from the representation of the eastern slope.

Now, there is one other area which has a special situation. Namely, the valley of the Rio Grande, which we usually refer to as the San Luis Valley. They have another series of problems. It is a country primarily irrigated by wells, but the demands of New Mexico and of Old Mexico on the Rio Grande, while they were not adequately recognized under the terms of the law, use up a great deal of the

water flow of the Rio Grande, and that part of the country is well country.

The consequence is, and I think this is what you were asking me to discuss a minute ago—the consequence is that we have on this great fundamental resource of water a division of the state, which I could even elaborate beyond what I have done.

Q. Is that division of water interest reflected by the boundaries of the district as set forth in the 1953 apportionment and in Amendment 7?

A. Yes, there is—you can see a very definite effort in that direction.

Q. Now, with regard—I am going to ask you if, sir, you recall the legislature of 1937 and the passage of the water conservancy district act?

A. Yes.

Q. And what sort of legislative problem was the Colorado legislature concerned with that would relate to this conflict of interest that you are talking about?

MR. CREAMER: If it please the Court, I do not believe that the witness can properly be qualified to go into the background of the water conservancy act of 1937. The act if it is pertinent is an act which is capable of being examined at length. It is one with which the Court is not unfamiliar, and, moreover, it is a problem which as to examination by the witness simply is not helpful at all. It is a protraction that is infinite. I think any act that affects the economic wellbeing of anybody in the State of Colorado could be equally used as a basis for examination of a witness here, and, frankly, I would submit to the Court that's quite beyond the scope of the inquiry.

JUDGE BREITENSTEIN: Well, we are going to overrule the objection, but perhaps, Mr. Kitchen, you are

not going to pursue that too long, that line, because there is considerable weight in what Mr. Creamer says. Well, let the witness answer.

MR. KITCHEN: This is an example, Your Honor.

JUDGE BREITENSTEIN: Go ahead.

Q What was the tool whereby the Frying Pan-Arkansas project—

JUDGE BREITENSTEIN: Let's don't get into individual projects. Now, if you want to bring up the economic impact and questions involved in the set up of the Colorado Water Conservancy Board—but I think that's as far as you need to pursue that subject.

MR. KITCHEN: All right.

Q Could you, Mr. Rogers, point to the particular provisions of this act which had to do with this conflict of interest and area interest in water that you mentioned?

A We have had a long series of legislation of which the water conservancy act is one of the late examples, of efforts to organize the diversion of water from the western slope to the eastern slope, and also included within that general project to organize these river valleys within themselves to get greater efficiency. Those are things that are of great interest to the river valleys. They have some interest to metropolitan Denver because there is so much financing done here, but they have almost no interest to the prairie country in the east or to the counties on the western side of the Divide.

Q One further question, you mentioned in your testimony that the last change in counties was made in, I believe you said, 1913, sir, is that correct?

A That's right.

JUDGE ARRAJ: He answered the question.

MR. KITCHEN: I am sorry, I didn't hear it.

THE WITNESS: Yes, I answered.

Q Yes, I am sorry. With regard to counties as such, what has been the structure of the government of Colorado, and by that I mean, has the—have the people left the structure of counties to the legislature in this state?

JUDGE BREITENSTEIN: That's a matter of law. We can read the law, Mr. Kitchen.

MR. KITCHEN: All right.

Q Speaking from a standpoint of the history which you have testified to, can you give the background and reasons for the law and the structure of the constitution with regard to counties?

JUDGE BREITENSTEIN: Well, now, please let's don't go to far afield on this, Mr. Kitchen. If we are going into the background of each one of these counties, we can be trying this case from now until Christmastime. How is that pertinent?

MR. KITCHEN: Well, because the structure of the amendment we are talking about has to do with counties, Your Honor.

JUDGE BREITENSTEIN: All right, but I am kind of reluctant to let you go into the background of each county and its boundary, but if you want to, go ahead.

MR. KITCHEN: I am not talking about each county, but the county system of Government in general.

A Well, historically—perhaps I can finish this up in a word or two—historically, counties have been created by the legislature whenever a community built up which had enough population and feeling of unity to ask for a county. Our counties have developed rapidly. For example, on the eastern plains during the periods of a cycle of heavy rainfall. They developed in the mining section when miners began to make discoveries, and these counties

have been created by the legislature, not always, but almost always when there was a demand sufficiently strong.

Now, it wasn't easy to do it because they had to take away from other counties to do it, but roughly speaking that has been the history of the development of the counties.

MR. KITCHEN: Thank you, Mr. Rogers.

JUDGE BREITENSTEIN: Is there any further examination of this witness?

MR. ZARLENGO: We had a little redirect.

JUDGE BREITENSTEIN: We will take the noon recess at this time.

The Court will be in recess until 1:30.

(The Court recessed at 12:00 o'clock p.m., and reconvened at 1:30 o'clock p.m.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

ARCHIE L. LISCO, et al,
Petitioners,

v.

STEPHEN L. R. McNICHOLS,
etc., et al,
Respondents.

and

WILLIAM E. MYRICK, et al,
Plaintiffs
and
Petitioners,

v.

THE FORTY-THIRD GENERAL
ASSEMBLY OF THE STATE OF
COLORADO, et al,

Respondents
and
Defendants.,

FEDERAL PLAN FOR APPOR-
TIONMENT, INC., et al,
Intervenors.

CONSOLIDATED

Civil Action No. 7501

Civil Action No. 7637

OFFICIAL TRANSCRIPT

VOLUME II

Afternoon Session,
May 6, 1963

Proceedings had before the HONORABLE JEAN S. BREITENSTEIN, HONORABLE ALFRED A. ARRAJ, and HONORABLE WILLIAM E. DOYLE, in Courtroom A, Main Post Office Building, Denver, Colorado, beginning at 9:30 o'clock a.m., on 6th day of May, 1963, as continued at 1:30 o'clock p.m., on the 6th day of May, 1963.

APPEARANCES:

As heretofore noted.

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(The Court reconvened at 1:35 o'clock p.m.)

MR. HARTHUN: May it please the Court, before we commence the proceedings, I would like to state on behalf of Mr. Salazar, Mr. Salazar apologizes for being unavoidably detained this afternoon.

With the Court's permission, Carl Harthun, with the permission of Salazar and Delaney, will carry on this afternoon.

JUDGE BREITENSTEIN: Yes.

JAMES GRAFTON ROGERS

resumed the stand and further testified as follows:

REDIRECT EXAMINATION

BY MR. ZARLENGO:

Q Dear Rogers, you testified this morning concerning various interests in the state, mining interests, water problems and agriculture and livestock and so forth. Will you state whether or not these various interests are important to the economic life of a state as a whole.

A Oh, undoubtedly. While Colorado is so varied geographically and economically, it is not greatly varied socially, but it is economically and geographically. The strength of the state is derived from all these interests combined and it is easy to over-picture the divergence.

The divergence is real, but it is kept under order by the very kind of machinery that is under discussion here, and these varied interests of Colorado—even Denver has heavy stakes in the prosperity and success and progress of agriculture, in its various phases of minerals, resources, water, the tourist industry, the great variety of interests, and a large part of the prosperity of the state is due to the balance of those, the fact that no one is dependent on any one of them.

Q Have these various areas and these various economic interests been represented in the legislature and the House through various apportionments and the ratio system and so forth?

A We have had some violent conflicts in the state history, particularly over coal and mineral mining, but outside of those and of the crazy performance of the Ku Klux Klan, the state has gone along amicably and smoothly, I think, over most of the states in the union.

Q Dean Rogers, is there any relationship between these areas and these economic interests and the ratio system that was in existence prior to Amendment 7 as far as representation in the House and Senate is concerned?

A Oh, yes, I think it is clear that the ratio system and the whole theory of something else than a mere capita representation are intended to protect the minority interests and the scattered interests as against any one overwhelming interest as represented by the metropolitan area.

Q And how about these economic interests?

A Yes: You mean—well, for example, I can't imagine the people of Denver in control of the legislature ever even understanding the farmer's problem on the South Platte or the Arkansas Valley area. It wouldn't be that they would be hostile. It would be simply incomprehensible to the people of Denver as to what their problems were, and, therefore, their representation is not only important to the preservation of those minority interests, those scattered interests, but also involves the whole welfare of the whole state.

MR. ZARLENGO: I believe that's all we have, Your Honor.

JUDGE BREITENSTEIN: Any further questions of Mr. Rogers?

MR. CREAMER: One or two, if it please the Court.

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CROSS-EXAMINATION

BY MR. CREAMER:

Q Dean Rogers, Section 46 of Amendment 7 provides that the state shall be divided into 65 representative districts which shall be as nearly equal in population as may be. Do you recall that provision?

A Yes.

Q And I believe when Mr. Kitchen examined you, one of his first questions was what the effect of straight population representation would be, and you stated that strict representation would be utterly disastrous. Now, do you consider that the provision in Section 46 for division into 65 representative districts which shall be as nearly equal in population as may be is utterly disastrous?

A No, because there is a check point. We have a bicameral system. The purpose of a bicameral system is to provide a check on one side against another. It is the only purpose that a bicameral system can have and a difference between the backgrounds of the two bodies is of very great value to a Commonwealth.

Q Yes, and then you point out that the metropolitan areas also have a majority of the membership in this checking Senate, so we have an utterly disastrous House and a majority in the Senate. If this is the case, how have you or how has Amendment 7 achieved that degree of balance among economic factors that is desirable?

A Well, I don't assume that either the metropolitan area or the rural areas will vote or act or even think in complete unanimity, and they are not hostile bodies.

Q They are not hostile bodies, are they?

A No.

Q And the areas are not hostile areas, are they?

A No.

Q And, as a matter of fact, all that you are basically saying is that Colorado is a rather large and complex state, in which there are quite a number of ways in which people earn their livings and each of these economic areas or ways in which they earn their livings have some problems, isn't that correct?

A No, that isn't all.

Q Well, that is essentially it.

A They not only have problems, but they need the means to present their problems and to have them brought to the attention of other people who haven't the same problems.

Q Dean Rogers, isn't it perfectly true that as long as there is representation from these areas in the several houses, the matter can be brought to the attention of the houses without a three-to-one preponderance of influence in the houses.

A Oh, yes, of course.

Q There is no problem of Las Animas County presenting a problem it may have without having a three and one-half to one advantage over another county in its presentation, is there?

A If Las Animas County was—just using that as an example for the moment—was wrapped up in a bundle with a lot of other counties which had no interest in the problems of Las Animas County, or to get it more marked, if Weld County, for example, which is almost purely agricultural in this irrigation sense, if Weld County was wrapped up with a series of communities, none of which had a farm in them, they wouldn't get a voice. They would be lost.

Q But we don't happen to have that problem, do we?

A No, we avoided it.

Q You have the tier of western counties, west of the Divide, almost being homogenous in their problems, don't we, and those are the heavily over-represented counties, but they still have voice; even if you reduced them to their proper population representation, would they not?

A No, on the whole, the heavily represented counties are the mountain counties, not the far western.

Q Yes, and these would still have a voice, even if they had only the same voice per capita as others, could they not?

A If you get an overwhelming majority representing any one point of view, the difficulty with the problem isn't a voting problem. It is a problem of the fact that they have neither knowledge nor patience to handle the problems of someone else who is outside of their zone of experience.

Q Do you seriously contend, Dean, that there is no knowledge in Denver capable of handling a mining problem and agricultural problem or a water problem?

A Well, not none. I suppose there are men drawn from Denver into the legislature and the Senate and the House who have some knowledge of mining problems, some knowledge of irrigation problems, some knowledge certainly of the recreation activities of the state, which are quite important.

Q As a matter of fact, Dean, Denver, not only with relation to Colorado, but for an area of seven states, has been for many years the major commercial goods distribution and financing and administrative operational center for that area, has it not?

A That's right.

Q Our banks finance the mines, don't they?

A Or somebody else's banks.

Q And our banks largely finance the cattle and wheat and sugar beets and all the rest, do they not?

A No, I wouldn't think that Denver financed the mining nor that it financed the agricultural interests of the state. I do think it finances a good deal of—parts of the—of the cattle industry, for example.

Q And the goods come largely to market in Denver, don't they?

A Yes.

Q And they are largely processed in Denver?

A Almost everything comes in.

Q And largely distributed in Denver, aren't they?

A The people of Colorado buy what they need primarily in Denver and they sell primarily to Denver.

Q And, as a matter of fact, given our present system of communications, there are very few parts of the state of Colorado that are very much more than three hours' driving time from the City and County of Denver, is that not true?

A No, you under-estimate that. During very favorable circumstances, you can reach Durango or Cortez in a long day's drive. In the winter, it is a much more difficult thing, and you have to got to pick the day and the weather to get into Denver within a day from Durango and Cortez in the winter.

Q You can get there in about 22 seconds by picking up a telephone, if the operator is not functioning well, and 5 if she is, is that correct?

A Oh, yes, you can get there by air, too, through part of the state. That is, the small population center, but that isn't the way we do. What we do is drive.

Q As a matter of fact, if you were put to it strictly, is there any way you could possibly relate what you mentioned as economic representation in the Senate as the Senate is constituted by Amendment No. 7 to any kind of formula which anyone could apply on other than a purely arbitrary basis?

A The distribution of the Senate under Amendment No. 7 appears to me to be the product of a complex of historical, economic, social, and not many political, elements, but it is a complex of them all. Certainly, it does not represent a distribution of the Senate on the basis of an International Business Machine product.

Q We don't have anybody we could call a Senator for sugar beets, do we, in the State of Colorado?

A Oh, yes, I would think that there are in both the Senate and House today a number of men whose primary interest is in the type of agriculture, and sugar beets is a very important part of it.

Q You believe that we have senators elected to represent sugar beets then?

A In a sense.

Q Now, do we have senators representative of wheat?

A Well, I can't think of anybody. We have certainly senators representative of cattle. We have senators representative of recreation interests, of the tourist business. That is, men who come from communities whose bread and butter is primarily bound up in those.

Q How do we determine whether the economic welfare of the state requires that we have two sugar beets to six wheats or one recreation to three silver or one gold to a lead or how do we establish the equation in that manner?

A I know no equation except experience, Mr. Crea-

mer. It is the product of—Amendment No. 7 is a product of a hundred years' experience in the state.

Q You mean, the mess we had in 1953 is so gorgeous a product of balanced experience which you have already stated was not even constitutionally predicated on this matter, that by adding four to that experience and freezing it in perpetuity, life is assured happily?

JUDGE BREITENSTEIN: Mr. Creamer, that's a pretty argumentative question.

MR. CREAMER: I think it is totally so, Your Honor, I will withdraw it.

JUDGE BREITENSTEIN: We will give you plenty of opportunity to argue this case later on.

MR. CREAMER: I deem there are no more questions we need ask at this point. Thank you.

JUDGE BREITENSTEIN: Any other questions of Mr. Rogers?

MR. HARTHUN: If it please the Court, I would like to ask a couple of brief questions.

JUDGE BREITENSTEIN: Very well.

FURTHER CROSS-EXAMINATION

BY MR. HARTHUN:

Q Mr. Rogers, calling your attention to the present existing constitution of the State of Colorado, Section 45 thereof, wherein it is recited that the census figures should be utilized for the revision and apportionment of Colorado, and that on the basis of such enumeration according to ratio to be fixed by law. Now, you have stated that it is your opinion that the ratio encompasses social, political, economic and so forth interests throughout the state, is that correct?

A No, the ratios are entirely a mathematical problem and associated basically simply with the question of tempering the pure population tests for apportionment. There is no way for a ratio, except very indirectly, to represent an economic interest or social interest or a geographic problem that I know of.

Q Do you have any other basis, statutorily or constitutionally speaking, for a divergence from the strict population ratio outside of this historical basis you have recited today?

A I was asked that before. As I testified, and I am not testifying—I am testifying from what apparently is the experience of the state and its history and what seems to have influenced its people. It seems to me the purpose of the population standard in the constitution, of the per capita rule, is to put a check on a legislature which has very wide discretion as to what it does in every particular, except as limited by the constitution.

In other words, while it doesn't say to the legislature, "Consider the social, the economic, the fiscal problems," it is assumed that that's what the legislature is there for, and the constitution simply says, "You have got a limitation on what you can do, which is that you must consider the distribution by population within the limits that we are prescribing."

Q In other words, it is merely more of an assumption than a mandate, isn't that right?

All right.

Q And the words of Section 45 as they existed in the previous constitution, which preceded the language concerning ratios, dealing with enumeration and apportionment for senators and representatives on the basis of such enumeration, that is qualified in your opinion by the

historical concepts as to social, political and economic interests, is that correct?

A It is qualified by the very nature of the legislature and the kind of topics the legislature deals with.

JUDGE BREITENSTEIN: Mr. Harthun, hasn't most of this material been gone over at least twice, once on direct and once on Mr. Creamer's cross?

MR. HARTHUN: What I am trying to illustrate, Your Honor, is the fact that the witness has no other legal basis.

JUDGE BREITENSTEIN: All right, we will go ahead. I just don't want you to walk down the same path that the others have gone around.

MR. HARTHUN: Well, I would finish with that area anyway. One other brief question.

Q You did state in 1850, many of the states, approximately or around the area of 1850, many of the states varied from the population, strictly population basis, and that this was done by law. Now, the fact that the constitution of the State of Colorado as presently cited here, this specific provision, 45, did not set forth any variation from the population as recited therein, would not that lead you to believe possibly that Colorado was refusing, rather than adopting, the trend that was supposedly being taken by other states throughout the country?

A No, I consider that it's—not I, but any student of government would consider that the Colorado constitution of 1876 does put a check on the pure population formula for representation by adopting the ratio provision.

Q And that is the only check?

A That's the limitation on it.

MR. HARTHUN: Thank you very much.

JUDGE BREITENSTEIN: Any further questions?

MR. ZARLENGO: No questions.

MR. CREAMER: No. Sir.

JUDGE BREITENSTEIN: That's all, Mr. Rogers.

THE WITNESS: May I be excused?

JUDGE BREITENSTEIN: Is there any objection to Mr. Rogers being excused?

MR. HARTHUN: No objection.

MR. ZARLENGO: No objection.

JUDGE BREITENSTEIN: Call your next witness.

MR. ZARLENGO: John Welles.

JUDGE BREITENSTEIN: Please stand and take the oath.

JOHN G. WELLES

called as a witness by the defendants, having been first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

BY MR. ZARLENGO:

Q State your name, please.

A John G. Welles.

Q Your address?

A 3062 South Gilpin Street, Englewood, Colorado.

Q What is your present occupation?

A I am head of the Industrial Economic Division, Denver Research Institute, University of Denver.

Q How long have you been engaged in that occupation?

A Since 1956, approximately six and a half years.

Q Will you state what is the nature of the Denver Research Institute?

A The Denver Research Institute was founded in 1947 as a department of the University of Denver to perform contract research for industry, government, individuals, both locally and nationwide. It now has about four hundred twenty employees, all of whom but sixty approximately are full-time research people. The Institute performs contract research in seven major areas. Six of them are scientific, such as metallurgy, physics, chemistry. The seventh area is the industrial economic area, which I head up.

Q You are the head of that division, are you?

A That's right, sir.

Q And you have been the head of that division how long?

A Since 1956.

Q What is the function of the division that you have?

A If I may go back just a minute, to describe a little bit of the kind of research that the Institute as a whole does, about a little over half of our dollar volume, which amounts to about \$5½ million a year, is done for the Department of Defense, Atomic Energy Commission, the National Aeronautics and Space Administration, various national firms such as General Electric, Martin Marietta, Westinghouse Electric, and so on. The division which I head up performs applied economic research for similar types of clients, including the National Aeronautics and Space Administration, Small Business Administration, Office of Civil Defense, The State of Colorado, City and County of Denver, Public Service Company of Colorado, Robinson Brick and Tile, to mention a few.

We work in the areas of reasonable economic analysis, which means economic forecasts through various economic areas or political, geographical sub-divisions and economic development programs. We also do plant research, plant location studies, feasibility analysis of proposed capital expenditures, and a certain amount of work in the economics of research and development.

Mr. Welles, would you tell the Court about your educational background and your experience?

A I have a Bachelor—

MR. CREAMER: Mr. Zarlengo, if I may interrupt, and I don't mean to, because it would be unquestionably an array, I will concede that, but we do have a time limitation and I don't think there is any disposition to question that Doctor Wellés is a perfectly qualified statistician. I really don't think that we have the expert problem we have in most cases anyway, so I would be disposed to concede his technical qualifications most certainly exist.

JUDGE BREITENSTEIN: All right, do you want them in the record, Mr. Zarlengo? Are you satisfied with that?

MR. Zarlengo. I wanted to get some of them in the record.

JUDGE BREITENSTEIN: With counsel's concession, you don't need to be quite as thorough as you would otherwise. We recognize the doctor's qualifications.

MR. ZARLESNGO: Very well, then since those are recognized, I think all the way around I won't take up further time on them.

JUDGE BREITENSTEIN: All right.

Q Mr. Welles, you told us that you are the head of this particular division. Did your division have occasion

to prepare a report for the State of Colorado in connection with Amendment No. 7?

A Yes, sir, we did.

Q And were you in charge of that report?

A I had over-all administrative supervision of the report. Dean Coddington was the actual project supervisor. He is on my staff.

Q And what function did you perform in connection with this report?

A I helped to formulate the research program. I consulted with the people doing the research work from time to time during the course of the project and I reviewed drafts of the final report.

Q I hand you Defendant's D and tell the Court what that is, please.

A This is the report which we performed for the Attorney General's office, State of Colorado, entitled, "Economic Analysis of State Senatorial Districts in Colorado."

Q I see inside the report is an errata sheet. Was that prepared under your supervision also?

A Yes, sir, it was dated May 2, 1963.

Q And Dean Coddington naturally supervised the work contained in the report?

A That's correct, sir, and performed a major part of it himself.

Q And you had general supervisory jurisdiction over it and reviewed the report after it was prepared?

A That is correct, sir.

MR. ZARLENGO: That's all we have of this witness, Your Honor.

JUDGE BREITENSTEIN: Any questions of Dr. Welles?

MR. HARTHUN: I have none.

JUDGE BREITENSTEIN: Mr. Creamer, do you have any?

MR. CREAMER: No.

JUDGE BREITENSTEIN: Mr. Kitchen?

MR. KITCHEN: No questions, Your Honor.

JUDGE BREITENSTEIN: That's all, Dr. Welles.

MR. ZARLENGO: Thank you, we will call Dean C. Coddington.

DEAN C. CODDINGTON

called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

BY MR. ZARLENGO:

Q Will you state your name, please.

A Dean C. Coddington.

Q And your address?

A 6612 South Ogden Street, Littleton, Colorado.

Q Your present occupation?

A Research economist, Denver Research Institute, University of Denver.

Q How long have you been so engaged?

A Approximately 4 years.

Q Will you tell us something about your prior experience?

A Prior to joining the Denver Research Institute, I was in graduate school at the Harvard Graduate School of Business Administration for two years. Prior to that period, I served as an installation engineering officer in the United States Air Force. Prior to that time, I was in undergraduate school, engineering school, and held a number of summer jobs.

Q Would you tell the Court about your educational background, please?

A I have my Bachelor of Science degree in engineering from South Dakota State College, my masters degree in business administration from Harvard.

Q And you have been with the Denver Research Institute I believe you say, four years?

A Yes, sir.

Q What duties do you perform for the Institute?

A In some cases—

MR. CREAMER: Mr. Zarlengo, if it will in any way assist, I am acquainted with Mr. Coddington's work in many respects. He is a perfectly qualified research economist. We would concede that is the case, and he performs those functions.

JUDGE BREITENSTEIN: That is true, Mr. Zarlengo, unless you have some particular reasons for going into the witness' qualifications.

MR. ZARLENGO: No, I haven't, Your Honor. If there is no objection, I will get down to the report.

Q Dean Coddington, I will ask you to state whether or not Exhibit D was prepared under your supervision?

A Yes sir, it was.

Q Will you tell the Court what you did in connection with the report, how it was prepared, and so forth?

A ' Very briefly, the approach we used in preparing this report was to first gather together all of what we considered to be pertinent economic, socio-economic and geographic statistics by county for the State of Colorado. These statistics were gathered primarily from what we might term standard sources, such as U. S. Bureau of Census reports, state planning reports, et cetera. After we had gathered together the statistics we then proceeded with an analysis again, which is contained in Part 1 of the report.

Q The report is divided into how many sections, Dean?

A The report is divided into two parts. Part 2 contains most of the statistical and graphic information Part 1 contains the analysis.

Q Now, in preparing that report, did you divide the state into more than one section?

A It became quite evident early in the study that—that is, after the basic statistics had been gathered and assembled—that there were four distinct geographic areas in Colorado. These four areas are what we call the western region, the eastern region, the east slope region, and the south central region. Would it be helpful if the people in the court had copies of the report so I can refer to specific charts?

MR. ZARLENGO: I believe we will. Your Honor, at this time we are going to offer Defendant's Exhibit D.

JUDGE BREITENSTEIN: Any objection?

MR. CREAMER: The exhibit is an extremely lengthy one, which none of us have seen until this morning. Upon principle, as I personally stated when we began this some months ago, I don't propose to object to anything in the nature of a statistical study that may be considered by the Court to be useful, but it appears to be some 2 or 300 pages

and it will be absolutely impossible to make an intelligent objection or intelligent exception. We would like to be able to examine into the matter. We have no objection to it as being introduced as an illustrative exhibit, as I trust most of the exhibits have been introduced are. As to the accuracy of the matters set forth, I simply don't know and have no way of judging.

JUDGE BREITENSTEIN: Well, of course, this is a trial to the Court, Mr. Creamer. I believe the members of the court can sift out the evidence. Any other objections?

Exhibit D will be received in evidence.

(Defendant's Exhibit D for identification was received in evidence.)

MR. ZARLENGO: Does each counsel have a copy of the report?

MR. CREAMER: Yes.

MR. HARTHUN: Yes.

Q Dean Coddington, each of the members of the court and each of the attorneys have a copy of the report, Exhibit D. Will you now go ahead and explain the four sections under which the state was divided?

A If the Court will please turn to page 2 of Part 1, second or third page, behind the blue divider, here is a map that shows the four economic regions. I mentioned that each of these regions was considerably different from other regions in the state. If I might very briefly—

Q Yes, tell us why you divided the state into four regions.

A Well, first of all, it becomes apparent when we look at the western region that you have an area that has

mountainous terrain, where accessibility between cities and counties in many cases poses problems. From a viewpoint of the economist, you have an area very rich in natural resources, water forces, minerals, scenic beauty and this thing. You have an area where agriculture and mining are the dominant basic sources of employment.

You have an area where the various levels of government own approximately two-thirds of the land.

In the eastern region, what might be called the plains region, you have obviously flat and rolling terrain. Dry farming is the major land use with over a third of the land being used for this activity. All but two of the counties in the eastern region lost population between 1950 and 1960 census. Agriculture is the dominant source of employment in the region and in every individual county in the region.

The south central region is differentiated by other factors. We have a Spanish or Mexican influence in the area. According to the census report, 39% of the population in that area has Spanish surnames. You had large losses of population in this area between 1940 and 1960, down 32%. This is what might be termed an economically depressed area, with low income levels, high unemployment rates, lower educational levels, this sort of thing. The basic sources of income and employment in this area are agriculture, most important, and then mining.

And, finally, we have what we have called the east slope region of Colorado. The major distinguishing characteristics of this area is rapid population growth. It is dense population. It is highly urbanized population. Manufacturing, trade and services are the major sources of employment in this area. Family incomes are relatively high and educational levels are high, but, briefly, these are the characteristics of the four regions that we have used in this study.

MR. CREAMER: May I make one inquiry at this point, which is sort of voir dire, I guess, and which may clarify one thing to me and perhaps to the Court? There are four regions shown on the map, but there are two counties stuck down in the southeast corner that don't seem to be in a region.

JUDGE BREITENSTEIN: I was concerned about same thing. Would you clarify that?

MR. ZARLENGO: Is that Prowers and Baca?

THE WITNESS: That is covered on our errata sheet. That is an error.

JUDGE BREITENSTEIN: I see.

MR. CREAMER: I hoped they weren't just floating territories.

JUDGE BREITENSTEIN: I was kind of worried about Prowers and Baca counties myself. One is Judge Arraj's county.

Q You have prepared, have you not, an errata sheet that has been prepared to the report?

A Yes, sir.

Q That covers that situation then, and some other errors that were in the report?

A Yes, sir.

Q All right, you have explained to us that the state was divided into four different regions. Have you told us why was that done?

A There were several reasons why this was done for the purposes of this study. First of all, it was quite confusing to us early in the study to have a mass of statistical data on different counties in Colorado. We had to have some framework by which we could relate the relative importance of certain of these statistical data. Otherwise,

our discussion which will follow of each senatorial district would have been even more lengthy than it is now. So, it was a matter of convenience for us in doing the analysis. It helped us in defining what was important, what was not important, in each of the regions.

In addition, we felt that it made a smoother—it made for a smoother presentation of the analysis of individual sub-areas within the region which followed.

Q Well, other than the matter of your convenience, does the state fall into these four different types of areas?

A In our opinion, it certainly does.

Q And are these distinguishing characteristics between these different areas?

A Yes, I have just tried to relate some of these distinguishing characteristics.

Q And those are also pointed out in your report, are they not?

A Yes.

Q Now, then, in addition to that did you go into the distinguishing characteristics between the senatorial districts in the area, in the four areas?

A Yes, we did.

Q Will you tell the Court what you mean by a distinguishing characteristic?

A Our definition of a distinguishing characteristic is something which we would place importance on in an economic analysis of an area. For example, in Las Animas County, the distinguishing characteristics of that area are those of a depressed area, losing population, with its economy based on coal mines and agriculture. Could I illustrate what I mean by distinguishing characteristics by pointing to some other examples? Would that be helpful?

MR. ZARLENGO: With the permission of the Court, we would like to have him do that.

JUDGE BREITENSTEIN: Go ahead.

A (Continued) Talking about District No. 13, in northwestern Colorado, which includes Moffat, Routt, Rio Blanco, Jackson and Grand Counties, from our viewpoint this particular sub-area is distinguished by mountain ranges and accessibility. In other words, the area is well defined by these problems of accessibility and by mountain ranges.

Another distinguishing characteristic of this area is that its economy is resource-oriented. That is, minerals, agriculture, lumber, tourism are all important to the economy of the area.

If I could talk about another district in eastern Colorado, District No. 18, which includes Elbert, Lincoln, Kit Carson, Cheyenne and Kiowa Counties, in our opinion this area is distinguished by its basic source of income and employment, which is agriculture. Over 38% of the work force in that area earns its living in agriculture. The populations of the area have declined. It is 100% rural. That is, there are no towns or cities in the area with 2500 or more population.

To take another district in what we have called the east slope region, District No. 2, which is Pueblo County, Pueblo County from the viewpoint of an economist is distinguished by its steel-based economy. Over 32% of the employment in Pueblo County is in manufacturing and most of that is in the production of steel.

These are some examples of distinguishing characteristics of different sub-areas within Colorado.

Q How about District No. 12?

A District—

Q Logan and Sedgwick, Phillips.

A District 12 is somewhat similar to District 18 in eastern Colorado. That is, that agriculture is the dominant source of employment for the whole district, and it is the most important source of employment for each individual county in the area. This is a primary factor.

Q Now, in your Exhibit D, did you point out all these distinguishing characteristics as to each senatorial district?

A Yes, near the end of our discussion of each district we tried to summarize the distinguishing characteristics.

Q In El Paso County, did you ascertain whether or not a large portion of the population is either in military installations or working for the government?

A Yes, the economy of El Paso County is distinguished by the fact that is largely dependent on military payrolls and it is also dependent on tourism as a major source of basic income.

Q That matter is also pointed out in your report, is it not?

A That is correct.

MR. ZARLENGO: Your Honor, since practically all of this is in the report and I don't want to repeat the whole thing twice, maybe we will just submit the report and everything for cross examination at this time.

JUDGE BREITENSTEIN: Mr. Creamer, have you had an opportunity to see this before?

MR. GINSBERG: I am going to cross-examine.

JUDGE BREITENSTEIN: Oh, Mr. Ginsberg.

MR. GINSBERG: I haven't seen the report, but I don't think it is necessary to for the facts I want to go into.

JUDGE BREITENSTEIN: Oh, now, you understand Mr. Zarlengo's testimony, the other testimony he would adduce from the witness, is all covered in the report. Since it is here, he sees no reason to amplify it by oral statement.

MR. CREAMER: I think that's true. It is the same problem we have on most of the statistics.

JUDGE BREITENSTEIN: You are ready then to go ahead and cross-examine?

MR. GINSBERG: My examination will be pointed to another direction.

JUDGE BREITENSTEIN: All right, we have received Exhibit D in evidence, is that right?

THE CLERK: Yes, it is.

JUDGE BREITENSTEIN: Go ahead.

CROSS-EXAMINATION

BY MR. GINSBERG:

Q When were you employed to make this report and investigation?

A December of 1962, I believe.

Q And by whom?

A The Colorado Attorney General's office.

Q And what was their objective in having you make it?

A Well, the objectives of making the study, I think, are stated in the introduction to the study.

Q I haven't read the report, so briefly answer my question.

A The purpose of the study was to make an economic analysis of the state senatorial districts as defined under

Amendment No. 7, with two purposes in mind. First, to identify the distinguishing characteristics from an economic, socio-economic and geographic viewpoint, and, secondly, to look at the similarities and dissimilarities of individual counties comprising multiple counties senatorial districts. That was the purpose of the study.

Q The objective then was to justify the selection of senators on a basis other than population?

A That wasn't their objective. It may have been the Attorney-General's office.

Q What other objectives could they have had?

A I don't know what their objectives were. I have a hunch.

MR. ZARLENGO: If the Court please, I see no materiality to this, what the Attorney General's objectives were. The question was whether this witness made an objective study.

JUDGE BREITENSTEIN: Yes, what the Attorney General—

Q What was your objective? What did you want to establish by the report?

A We wanted to establish what the characteristics were, if any, for each senatorial district in Colorado, and show what the differences were, if there were any differences. We were looking at three factors.

Q With what objective in mind? Why were you seeking this conclusion?

A It is necessary we have to have a conclusion in order to do an economic analysis?

Q Usually there is an objective to any analysis, economic or otherwise. You must have had some objective in concocting this report.

A There are two types of economic studies that we do primarily. This falls in one category. The first is to evaluate an area for the purposes of a bank or some other type of facility that somebody might want to construct in the area. In other words, look at the economic base in view of specific projects, which may take place in the area.

The second type of economic study that we do is simply to identify the major economic forces at work in an area without any particular purpose in mind for this information to be used for.

Q You have then no particular objective in mind at all in the use of your report here?

A Well, we know what the—what part the report was going to play in these proceedings, but that had nothing to do with the type of information that we are presenting.

Q What part was it intended to play in this proceeding?

A We understand that the report was to be introduced as evidence on the assumption that the information contained in here would be of interest to the Court in making their decision on the constitutionality of Amendment 7.

Q Then, that was your objective in preparing this report?

A Yes, the objective was to prepare a document which would be useful to the Court.

Q You sought to advise the Court there that there are different types of terrain in Colorado? You think that is informative of the issues in this case?

A The issues?

Q I say, do you think that information is useful to the Court in this instance?

A We were told that it would be useful. This is why we went ahead with it. I don't know personally whether it is of value or not. We went ahead on the assumption that it would be. Our task was clearly defined by the Attorney General's office to look at the factors we would normally look at in economic analysis, and topography and terrain is one of the factors.

Q Just what importance or vitality of the issue was what type of people live in a different community, whether Mexican or what not, what did that have to do with the issues in this case?

JUDGE BREITENSTEIN: Isn't that a matter for this Court to decide?

MR. GINSBERG: Yes, certainly, it is ultimately, but I am trying to get to the basis or purpose behind this report. I don't intend to be too lengthy. I think it is obvious I am trying to be helpful to the Court, as they represent they are trying to be helpful to the Court in furnishing this.

JUDGE BREITENSTEIN: Go ahead.

Q Now, you refer to Mexican population in one segment covered by the report. Just how helpful would that matter be to this Court in determining this constitutional question?

A Is is the same question you just asked.

JUDGE DOYLE: Yes, you haven't answered it yet.

A (Continued) I don't know how helpful it would be to the Court.

Q In approaching this report, did you take the view every segment of the economy ought to have separate representation? How many different types of economy exist in the one district of Denver?

A I am sorry, I did not understand you.

Q How many diversified interests are there right in one city, the City of Denver?

A I have no idea.

Q A great number of them, aren't there?

A I would imagine, yes, sir.

Q Do you think each of them by the reason of their type of industry is entitled to representation on that basis?

MR. ZARLENGO: Your Honor, we object to this line of testimony. These are matters for the Court to pass upon. We put this man on who has prepared an objective study, an economic study, and the weight of that is to be determined by the Court. He isn't making any recommendation as to how apportionment should be made.

JUDGE BREITENSTEIN: I think that's true Mr. Ginsberg, I don't understand that this witness tried to make any recommendations or do anything but make an objective analysis. I notice on page x of his report, they have a statement of objectivity of analysis. Maybe that has some materiality. I don't know.

MR. GINSBERG: May it please Your Honor, I listened to the testimony of this witness and the report and previous testimony and they are all of the same vein and same character. By this type of testimony they are trying to testify a breach of the provisions of the constitution of this state and the federal government. They create fanciful reasons for doing so. This is a cross-examination and my purpose, briefly stated, is simply to show that their attempt to dissect the state into territory representing different interests serves no useful purpose in this case at all, has no bearing on it.

JUDGE BREITENSTEIN: That may be true, Mr.

Ginsberg. You may go ahead, but I have just got one request. Let's leave the argument until the end.

MR. GINSBERG: All right, sir, I will try to avoid that as much as possible, Your Honor.

JUDGE BREITENSTEIN: All right.

Q I ask you, sir, confining your examination that you supervised to Denver alone, you find many diverse areas in this city, diversified a whole lot more than you have in your report of these different sections of the state, is that correct?

A I don't know. I haven't looked at interests. I have tried to identify the major economic forces at work in various parts of the state. This is not in my opinion the same as interests. So, I can't answer your question.

Q You think each and every economic force in the state has to have separate representation?

A I am making no comment on this at all. I am simply pointing out what the characteristics of these areas are from the viewpoint of an economist. There is no statement in this report, if you would read it, saying that certain areas should have certain representation. We are simply showing what the character of these areas are.

Q With the purpose of advising this Court and being helpful to it in determining whether or not the method adopted for the selection of senators in this state by Amendment 7 is constitutional or not. That's the objective, is it not?

A Right.

Q And you understand that to be the objective?

A Yes, to be helpful to the Court, yes.

Q Yes, so you analyzed the diverse interests in a statement of that spirit of helpfulness toward the Court.

A Yes, plus being paid for it.

Q Yes, that's usually a motivating force. So, in your ultimate accomplishment, you divided the state into mountain territories, dry land, irrigated, and a separate category, manufacturing, with a viewpoint that in the selection of state senators we ought to select them on a basis of serving these individual economic interests, is that true?

A I didn't say that.

Q What else did you seek to accomplish by the report?

A I think the purpose of the report is spelled out very clearly.

Q Well, stated in simple language.

A Pardon?

Q State your objective in simple language.

A I read it to you out of the report.

MR. ZARLENGO: He has done it about three times, Your Honor.

JUDGE BREITENSTEIN: Let's do it again. Go ahead.

A (Continued) Referring to IX, page IX, objective of the study; the primary purpose of the study is to determine the distinguishing economic, socio-economic and geographic characteristics, if any, of each senatorial district, and to consider the similarities and dissimilarities of the counties making up each multiple county district.

There are two more paragraphs relating to the objective of the study. I would read them, if you would like me to.

Q Just give me a moment. I will read them. So, in your objective you state specifically that your objective is to reconcile a selection of senators under Amendment No. 7.

A Would you point that out to me, please, where we say that?

Q Yes, your last paragraph on page 9, objective of study in the case of state senatorial districts. "It is our understanding that the determination of whether the present districts of Colorado constitute appropriate political entities involves many considerations, as mentioned earlier. Since our analysis is limited to only a portion of the relevant considerations, it is not possible for us to draw any over-all conclusions. Rather, we attempt to present facts and analyses, within our areas of competency, to assist those who must determine whether or not the present apportionment is in violation of the Fourteenth Amendment to the U. S. Constitution." You clearly knew the objective of your employment?

A Well, what do you mean by the objective of our employment?

Q Was to demonstrate to the Court that the method of selection of senators under Amendment No. 7 did not do violence to the Fourteenth Amendment of the United States Constitution.

A That may be the objectives of the people that hired it, but it is not our objective in the study.

Q What other purpose did your study serve than that?

A You want me to go through that again, the purpose?

Q No, what other purpose than the ones just stated did it serve?

A I don't know. You will have to ask your client that.

Q Well, it reverts to your client, and your client was the Attorney General.

A Yes.

Q And you were paid by the Attorney General of the State of Colorado for the services?

A That's correct.

MR. GINSBERG: That's all.

MR. CREAMER: I wonder if I might ask just one question, realizing that it is out of order for two attorneys on the same side?

JUDGE BREITENSTEIN: Before you do that, I had the feeling during the last examination that there was some perhaps misunderstanding in use of terms. There is a difference between the word "objective" and the word "objectivity", and I wondered if counsel weren't talking about one and the witness about the other.

MR. GINSBERG: I didn't quite follow, Your Honor, on that.

JUDGE BREITENSTEIN: Well, there is a difference between "objective" and "objectivity", and I had the feeling that you were talking about objectives and the witness was talking about objectivity.

MR. GINSBERG: I was definitely talking about objectives.

JUDGE BREITENSTEIN: I thought there might be some areas of misunderstanding, so I mentioned it.

MR. GINSBERG: That was clearly my intention.

JUDGE BREITENSTEIN: I understand. Go ahead.

FURTHER CROSS-EXAMINATION

BY MR. CREAMER:

Q Mr. Coddington, in your study you have broken the state down into four basic geographical regions, and

you have indicated those on the map as you mentioned. Then, within that same map, you demonstrate by a heavier outlining what I gather is the senatorial district within those divisions, is that correct?

A Yes.

Q Now, may I ask you this, and it is necessary to arrive at it, is there contained in your study any specific data by which we were able to ascertain anything more than the general facts that there are topographic, geographic, historical and economic factors variant in the several districts? That is, can we ascertain any facts from which we can determine how geographical, economic, historical and topographic circumstances relate to the ratio of representation of these districts, one to the other?

A It seems to me that the answer to your question is that you can use this report however you please, if you want to relate the information that's in here to the question at hand, but there was no purpose—the purpose of the report itself was not to relate these geographic, economic and socio-economic to the question. It was simply to give background information which might be useful.

JUDGE BREITENSTEIN: Will you pardon me, Mr. Creamer?

MR. CREAMER: Certainly.

JUDGE BREITENSTEIN: You mean this, that it was your task, as you saw it, to present facts but not to interpret those facts? Is that a fair statement?

THE WITNESS: I think there are two types of interpretations that we are talking about, if I might clarify this. There is interpretation in this report, but the interpretation is that which is necessary for any person doing an applied economic study to make the mass of data somewhat useful and understandable to most people.

Now, beyond that, we have not gone beyond that particular step. We have tried to present useful information, and that's it.

JUDGE BREITENSTEIN: I see. Go ahead.

Q (By Mr. Creamer) Let me try to place the matter in one example. Perhaps that will simplify matters. You have an area called the south central area on your map. One of the senatorial districts involved in the south central is District No. 23, which is Las Animas County, and it has approximately 90,900 people in it. Another of the districts involved in that area is Huerfano, Costilla, and Alamosa Counties, if I am not mistaken, and they have approximately 22,000 people in them, and the third area is District No. 31, Saguache, Mineral, Rio Grande and Conejos Counties, is that correct? I mean, those three senatorial districts are comprised in what you call the south central area.

A That is correct.

Q Now, adding 23, 30 and 31 together, we get about 46½ and 20—about 66,500 people more or less resident in that particular region. Now, each of the three districts has one senatorial representative or the aggregate of this south central region has three such representatives, is that correct?

A That's my understanding.

Q All right, now, is there anything in your report or any place in your report or any endeavor in the report to demonstrate any kind of formulation whereby we would be able to relate this representation of three representatives for 66,000 people in the south central area, for example, to the representation of 118,000 people immediately to the north in Pueblo by two representatives? I mean, is there anything, any logical relationship, which you state is ascertained from your report of a representation of 59,353

persons represented in Pueblo, immediately to the north, and approximately 22,000 per representative in the south central region immediately below?

A I understand what you have been talking about, but I don't understand what your question is.

Q My question is, does your report after considering the factors that you have mentioned as being included in it, which as I understand are topographical features, socio-economic features, economic features, generally all of these things, is there anything in the report that explains why it is rational that there be two persons representing 118,000 people, and three persons representing 66,000 people?

A There is no specific discussion along the lines of your question, no, in the report.

Q Now, you have mentioned among other things locus of ethnic and likewise particular groups. For example, I think you mentioned that there are 39% Spanish surnames in the south central area. I don't know what the statistic might be in other areas and it doesn't matter particularly what it is, but assuming that that is the case, is there any relation anywhere in your report to the representation of ethnic groups, that is let us say, in the south central area, to ethnic groups of the same kind, let us say, in the Denver area?

A No.

Q If there is a predicate for ethnic groups constituting a consideration factor here, does your report demonstrate anywhere any reason for a different weighting of the ethnic group south centrally located and located in Denver?

A Well, I think it does in this sense, that when we are doing an economic analysis of any area, the things that we look at primarily are the unusual factors. Let us say unusual in the sense they are different from the average.

In the south central region, you have 39% of the people with Spanish surnames. This would be an important factor and is an important factor in economic analysis of that as a geographic area. Looking at Denver, as a whole, to do an economic analysis, there may be more people of Spanish surnames in Denver, I don't know, but the percentage of people with Spanish surnames is very small. When you look at Denver from the viewpoint of an economist, other things such as the city's position as a trade and transportation center are much more important and deserve much more consideration.

Q Mr. Coddington, on the whole in your report I take it that we are able to ascertain that there are topographic, geographic, historical, economic or socio-economic differences in different areas of the state of Colorado and in different counties within those areas, is that correct?

A With the exception of the word "historical", which we haven't gone into, it is correct.

Q Very well, but from this study, I take it we are not able specifically to determine whether the given senatorial representation of any area aggregately or any part of an area, any district within the area, or those districts, one to another, have any particular formulated relation, is that correct?

MR. ZARLENGO: Object to the form of this question. These are the very matters that the Court will have to determine.

MR. CREAMER: Well, I don't think so. I am asking about whether there is anything in this report that would give us that.

JUDGE BREITENSTEIN: I think it is a proper question. Overruled. Go ahead.

A Would you state the question?

Q I would ask the reporter to read it.

(The reporter read the pending question.)

A I am not sure I understand your question completely. I will take a try at this, that the report does not go into the relationships of the economies of individual areas. It does not tie these relationships to the representation. There is no effort made to do that in the study. Is that—

Q That essentially was what I was endeavoring to find out. Now, if I were further to ask you from this study which contains topographic, geographic, economic and socio-economic, but not historical relationships—if I were to ask you, given a senate of 39 members, given everything you know about the County of Pueblo and everything that's in this report, given the population of the County of Pueblo, at 118,000 persons, could you state how many representatives on this, topographic, geographic, economic and socio-economic, the County of Pueblo ought to have in the Senate of Colorado?

A I couldn't state.

MR. ZARLENGO: We object to this question. It is immaterial.

JUDGE BREITENSTEIN: Well, I am bothered about this question, Mr. Creamer, because it seems to me that that point was not covered by direct examination, and for the purposes of that question he is your witness. You would be bound by the answer.

MR. CREAMER: I think he already answered it, and the answer was no. I would be bound by no.

JUDGE BREITENSTEIN: All right, go ahead.

MR. CREAMER: I think he did answer the question, if it please the Court. I think perhaps it is outside of scope. I am not trying to go beyond it. I regret it, except the re-

port is rather massive and none of us have been able to digest what it contains in it.

JUDGE BREITENSTEIN: Go ahead.

Q (By Mr. Creamer) I take it then, Mr. Coddington, that in essence what you have done is simply compile all of those data you think might have a utility and classify them, first, by district, one of your four major districts, and then by senatorial districts within those major districts.

A Essentially, that's what has been done.

Q And you have not attempted then to apply your data specifically to the representational relations that exist between districts or among them in a given territorial subdivision, nor have you endeavored to project what might be a proper distributing relationship on the basis of topographic, geographic, and economic factors you have discussed.

A No, we have not done that.

MR. CREAMER: Thank you very much.

JUDGE BREITENSTEIN: Any other examination of this witness?

MR. KITCHEN: Yes, sir.

JUDGE BREITENSTEIN: Mr. Kitchen, how long will your examination take? We have almost reached the time for afternoon recess.

MR. KITCHEN: I think no more than five minutes, Your Honor. I have just a couple of clarifying questions I would like to ask.

JUDGE BREITENSTEIN: All right.

FURTHER CROSS-EXAMINATION

BY MR. KITCHEN:

Q Mr. Coddington, on this last point I notice on Part

2, page 64, you do have a tabulation of the population and the number of senators and the percent of the number of senators to the total for each region, is that correct?

A That's correct.

Q Was that done in any attempt to justify or criticize the representation in the senate, as far as you were concerned?

A The purpose of that particular table—as you can see, it is added on to the end of the report—is to give information primarily to people that might be looking at this report sometime in the future. This is information we felt that might be of interest to anybody reading the report, but it really had no part of the analysis.

Q This is a summary statement, is that correct?

A Well, it is.

Q Of the representatvie facts as they apply to these regions.

A Yes, in a sense, it is.

Q I also had one other thing I wanted you to explain. Perhaps I am ahead of you on your errata sheet, which I don't have. On Part 2, page 59, I notice you have what looks like a map of New England, and then a note under it with regards to width and vehicles and so on. I wonder, has this been corrected or—

A That's covered on the errata sheet.

MR. CREAMER: Did you say page 59?

MR. KITCHEN: Part 2, page 59.

MR. CREAMER: Mine is a map of Colorado with a lump of red stuff and two lines below crossed out in ink.

Q Perhaps you would explain this.

A This is a typographical error. The note on the bottom should be deleted. We deleted it on some of the pages, but not all.

Q Is that in the errata sheet?

A Yes, sir.

Q I see, the red lines are a map of New England superimposed over a map of Colorado, is that correct?

A That is correct.

Q Was it part of your assignment either to justify or to criticize the apportionment or districting of senators under Amendment No. 7?

A No.

Q Was the compensation which you were to receive for the use of your report contingent upon the result?

A No.

MR. KITCHEN: Thank you.

JUDGE BREITENSTEIN: Any other questions of this witness?

That's-all, Mr. Coddington.

The Court will take the afternoon recess at this time. We will be in recess ten minutes.

(The Court recessed at 2:55 o'clock p.m. and reconvened at 3:07 o'clock p.m.)

MR. SEAVY: Call Mr. Lawson.

— JOHN P. LAWSON

called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

BY MR. SEAVY:

Q Will you please state your name.

A John P. Lawson.

Q Where do you reside, Mr. Lawson?

A I reside in Denver, Colorado. 2026 South Fillmore Street.

Q What is your occupation or profession?

A Currently I am executive assistant to the Governor of Colorado.

Q How long have you been so employed?

A Since January 8th or 9th of this year.

Q And would you relate your educational background?

A I grew up and was raised in Rocky Ford, Colorado, a couple of years of high school, went to the Naval Academy at Annapolis. I was in the War, Class of 1921, first class year. Spent about four months and was turned back before I graduated because of the disarmament conference.

MR. CREAMER: I wonder if Mr. Lawson could speak just a little more loudly?

JUDGE BREITENSTEIN: Yes, the accoustics aren't too good.

A (Continued) Thank you, sir. I then spent one year at Colorado College, a year at the University of Denver, after which I received an A.B. degree, and then another year an M.A. degree, and I have since that time spent approximately 8 or 10 months at the University of Chicago and University of Michigan. I did not get—I have not obtained any degrees beyond the M.A., however.

Q And following the completion of your bachelor's degree, what did you do, Mr. Lawson?

A I began to teach political science at the University

of Denver and was employed there as a teacher in one capacity or another from about 1924 until the end of 1962.

Q And in your teaching at the University, what positions did you hold, sir?

A Well, I went through all of the academic ranks. I became a full professor in about 1936 or '37 and am now a professor emeritus.

Q Would you relate briefly to the court the subjects taught during this period of time at the University?

A Well, I taught most of the subjects in the ordinary government or political science that any ordinary government or political science would teach, American Government, state and local, constitutional law, constitutional history, both English and American, political parties, administration and the like.

Q And this I believe you indicated over a 38-year period?

A That is correct.

Q At the University.

A That is correct.

Q And I believe you have also indicated, Mr. Lawson, that you are a near lifetime resident of the State of Colorado.

A I consider myself to be a resident of Colorado all of my life.

Q And in the course of your 38 years of teaching government, you have had I would imagine occasion to relate your teaching to Colorado government in Colorado.

A That is correct.

Q Mr. Lawson, preliminary to the relation of the bicameral system to the present Amendment 7, would you briefly relate the evolution of the bicameral system.

A Well, it seems to me that the bicameral system quite clearly grew out of an accidental breakup in England in the 12—13th century, chiefly of the three estates. Might have gone to a tricameral or gone to a bicameral house. The accident in history and the exigencies of that situation led to a bicameral situation.

Actually, as I read English history, the House of Commons, which is the house most nearly based on population in England, grew out of the necessities of King John in 1213 to get some valuable aid and money from certain counties and Simon deMontfort in 1264 to get aid in the revolution he was then attempting to carry on. In other words, that's the way it started. I don't think anybody thought it up, but once started, as is true of so many things in English history, it stayed, and the British in about 300 years discovered that it needed to be worked over and they did that, began to work it over, and there has been a gradual evolution since that time, I think, and almost at no time, however, until very, very recently have the British either achieved or attempted to achieve anything like an exact relationship of members in the House of Commons to population in the country.

Now, that's going through quite a process, beginning with the Reform Act of 1882, and culminating in an Act of 1898. I don't know if the Court would like to have me go into that in detail or not.

Q Was the bicameral system, as it was known in England, adopted or brought into this country during the period of colonization?

A Yes, sir, with the exception of, I believe, Pennsylvania, Georgia, for a time it was in the colonies. The thirteen English colonies brought with them the bicameral system.

Q At that time was there any historical fact or prece-

dent relating to the number of representatives in a upper and lower house.

A. No, sir, I don't think so. The upper house in British history and in British government today is by all odds the more numerous of the two, because of its hereditary character. The House of Lords, that is, but at times it became less numerous, depending upon how many lords got themselves killed as in the Wars of the Roses and things of that kind, so I think there was no relationship of that nature definitely established at that time.

Q. Did any such relationship as to numbers in the upper house and lower house evolve in the American bicameral system or the use in America of the bicameral.

A. Yes, in the colonial period, it was customary in the Royal colonies, and to a certain extent in the proprietary as well, for the upper house in effect to be the governor and his council. This was generally a small body, maybe ten or a dozen or fifteen, twenty, something like that.

The lower house, which was frequently known as the assembly, on the other hand in the colonial period was based upon a very, very rough approximation of population. Actually more based on counties in the south and towns in New England, and both in the Middle Colonies, but it did represent people to some extent and was larger.

Q. Perhaps you have described it to a certain extent, but was there a natural consequence that flowed from this disparity in numbers in the two houses as to representation?

A. Yes, I think there was, and it might have flown from other historical factors as well, and that is the great difference in representation as developed in America since say James Donald roughly and the beginning of the Colonial Period and in England. As you know, in England every member of the House of Commons considers himself

a representative of the entire Empire, and it matters not where he resides, and as a matter of fact, about 20 to 25 per cent of the House of Commons consists of non-residents. Winston Churchill, for example, is not a resident of the district he represents, but in America because of the diverse situations, it quite early became the custom that representatives should be tied to the locality, and now it is extremely rare, although constitutional as far as the Federal constitution is concerned, but extremely rare that any member of Congress not reside in the district from which he comes. That is, I think, one contribution that we perhaps unconsciously made during the colonial period.

Q Did there also evolve from the use in America of this bicameral system a difference in which might be called a representative, or the lower house, representing people, and the upper house representing interests?

A I would think so, because the lower—the upper house, pardon me, in the colonial period represented nobody but the Royal Governor or the proprietor, whereas the lower house represented people. Consequently, as after the Revolution when the Senate replaced the old Governor's council, it tended less, much less, to represent people per se than did the what used to be called assembly and then became known as the House of Representatives. That is correct.

Q Well, would you explain in a little more detail—I am not certain that I follow—would you explain in a little more detail the representation of interests differing from the representation of people?

A I think we had good precedent in England, if I may go back there. The House of Lords represents nothing but itself, it has been said, and that is certainly interest representation. The then Governor's Council, the American Colonial Period, represented an interest, to wit the royal interest, in the Royal Colonies.

Now, after 1776, the Declaration of Independence, we embarked on our own course. It seems to me quite logical to expect that we did find that the upper houses were much less closely tied to people because, no doubt, of their background than were the lower houses which had prior to that time been tied more closely to people. Do I make myself clear, Mr. Seavy?

Q I think so. The interests then you speak of, you have mentioned the royal interests being represented in the upper house—would you give examples of the interest being represented in the upper house in this country? What I am looking for is what you are meaning by interest.

A Property in the early history. Wealth in some of the northern colonies, the Church, one church or another, Unitarian or whatever the church might be that was dominant, interests of that nature. Of course, from that time on, other interests, such as where one lived—that has always been very important in America because of the large area, and in the case of Virginia, for example, the Tidewater versus the Piedmont, with the Tidewater rather heavily represented and the Piedmont or mountain district not heavily at all represented in that body.

Q You mentioned area. Has there been in the history of this country since the time which you are now speaking of generally a representation of economic interest in the upper house?

A. In fact, but not in constitution, yes. In fact, I think that is correct.

Q Now, does in your opinion, Amendment 7 bear any relation to this evolution of the bicameral system in this country?

A Well, in my opinion, number 7 pretty well epitomizes one of the reasons for a two house system in the average American state. It seems to me that if both of the houses were based totally and solely on population then they

or one of them would be redundant, the unnecessary, the superfluous.

Now, of course, there is the check and balance value of two houses, but I have always felt that that has been overdone and that representative-wise certainly it seems to me that No. 7, the amendment, did rather closely accomplish what in fact has been accomplished earlier, much earlier in our history in the American state, that is. Not in regard to federal government.

MR. SEAVY: Nothing further, sir.

JUDGE BREITENSTEIN: Cross examination?

CROSS-EXAMINATION

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FURTHER CROSS-EXAMINATION

BY MR. KITCHEN:

Q What specifically was the arrangement of the legislatures of the states at the time of the adoption of the Fourteenth Amendment?

A Mr. Kitchen, I made an effort to determine that and historically it is difficult to nail it down, because of lack of resources, but I would say that it was precisely or very nearly precisely the pattern which I have been discussing in my testimony.

Q Isn't it true, Mr. Lawson, that no state has ever—or, rather, let me amend that—that no state in the union at the time of the adoption of the Fourteenth Amendment had a system whereby both houses were selected strictly according to population?

A I believe that to be a fact, sir.

Q Now, isn't it also true that both the Federal Constitution approved by all of the states and the Seventeenth

Amendment of the Federal Constitution approved after the Fourteenth Amendment specifically recognized the existence of the bicameral system in the state governments?

A Yes, sir. The whole United States Constitution, as a teacher, I would think does.

Q And expressly, isn't that correct?

A Quite right, sir.

Q Isn't it also true that the Fourteenth Amendment expressly makes it the duty of Congress to see that the terms of the Fourteenth Amendment are carried out?

A Yes, sir, that's Section 5, I believe.

Q Isn't it also true that Congress has approved and admitted to the union the states of Hawaii and Alaska within the last several years?

JUDGE BREITENSTEIN: Well, that's a matter of common knowledge, also a matter of law, Alaska and Hawaii have been admitted in the last few years.

MR. KITCHEN: Well, it is also a matter of common knowledge as to the disposition of the Northwest Territory, the regulations under that.

JUDGE BREITENSTEIN: Yes, I understand. I was just trying to relate the examination to facts and opinions of the witnesses on the facts, rather than the law. Go ahead. Sorry to interrupt you.

Q Is that correct, Mr. Lawson?

A Would you repeat it, please, sir?

MR. KITCHEN: Would you repeat the question?

THE REPORTER: "Isn't it also true that Congress has approved and admitted to the union the states of Hawaii and Alaska within the last several years?"

JUDGE BREITENSTEIN: In effect, the question

was whether or not you knew Alaska and Hawaii had been admitted to the union in the last few years?

THE WITNESS: Yes, sir.

Q (By Mr. Kitchen) What effect did those two states have with effect to the bicameral situation—

MR. CREAMER: If it please the Court, this is not a matter of fact. It is expressly a matter of law. We can find the statutes.

JUDGE BREITENSTEIN: I know. Let's make progress.

A They both have two houses, bicameral system.

Q Do the upper house or the Senate in Alaska or Hawaii—are they apportioned according to any theory of population or on some other theory?

A Mr. Kitchen, I must confess I am not positive. I would have to say I am not sure.

JUDGE BREITENSTEIN: What difference does it make, one way or the other?

I asked you a question, Mr. Kitchen. What difference does it make, one way or the other?

MR. KITCHEN: Well, we think it makes a great deal of difference, Your Honor. Mr. Creamer has been talking about relating population to the houses of the state legislatures, and we think that the houses of the state legislatures—

JUDGE BREITENSTEIN: My point is we are concerned with Colorado and a question of law as to whether a provision of the Colorado constitution violates the federal constitution. Now, so far as Hawaii and Alaska are concerned, we are not deciding whether something is wrong out there.

MR. KITCHEN: Well, I understand, Your Honor, but

I think this is pertinent with regard to the terms of the Fourteenth Amendment, the fact that a branch of the federal government has accepted those constitutions as guaranteeing a representative form of government and recognizing the history of the bicameral system in the United States.

JUDGE BREITENSTEIN: Very well.

MR. CREAMER: If it please the Court, I might point out, and this is a legal objection, Baker versus Carr very clearly demonstrated that the guarantee clause was not what was involved in this matter and we are not interested in that.

JUDGE BREITENSTEIN: That's what I remember. That's what the controlling opinion of Baker versus Carr says.

Q (By Mr. Kitchen) With regard to your testimony concerning the initiative and referendum, I think you testified with regard to the ease of amending the Colorado constitution, is that correct?

A Yes, sir.

Q Have you made an analysis of initiative and referendum among the several states?

A I have a continuing analysis, Mr. Kitchen, and I sought to bring it up to date to the best of my ability in the last couple of days, yes, sir.

Q Would you please describe it or can you classify the various types of provisions in the state constitutions with regard to initiative and referendum?

A Yes, there are two kinds of initiative and also referendum, two each, one applying to statutes, both initiative and referendum, one applying to constitutional provisions.

Colorado has all four of those. Most states do not.

Colorado was quite early in establishing the initiative and the referendum, relatively early. It came during that so-called progressive period in American history of Theodore Roosevelt and Woodrow Wilson, 1912, along in there, and I think we have unquestionably in this state one of the most, if I may use the term, liberal or easily applied systems of initiative and referendum as applied both to constitutional amendments and as applied to statutes. I can go into that at greater length if you wish me to, or not.

Q Well, with relationship, for example, to the requirements of the number of electors necessary to initiate an amendment, can you compare that to Colorado and other states?

A We require 8% and that is the exact median on statutes and it is low on constitutional amendments, the 8%.

Q Low with relation to other states?

A Yes, sir, relation to other states. We also—pardon me.

Q I am sorry.

A We also relate it to the Secretary of State, the vote cast for Secretary of State, 8% in a case of initiative, 5% in referendum. Many states relate it to the vote cast for governor. There would be 35,000 difference then. It is easier to get 35,000 less than the total number. We also have no provision in Colorado that provisions on the initiative be scattered about the state, so many per county. Some states have that, making it more difficult. We also in this state provide that the issue shall be determined by the people in event of an initiative at the next general election, but the issues shall carry if carried by a majority of those voting on the issue not at the election. That is easy, because generally fewer people vote on issues than in the election. That is, many people skip the issues, and then finally we have the direct system. That is to say, a proposal to amend a constitution or to initiate a statute in this

state is accomplished by a petition. It then does not go to the legislature. Some states have the indirect system in which it goes to the legislature and then possibly to the people. All of those factors, I think, Mr. Kitchen, put Colorado in the class of state where it is relatively easy when it comes to I and R, initiative and referendum.

MR. KITCHEN: Thank you very much.

JUDGE BREITENSTEIN: Any further questions of this witness?

MR. ZARLENGO: No further questions.

JUDGE BREITENSTEIN: That's all.

THE WITNESS: Thank you, sir.

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INTERVENOR'S WITNESSES

Joseph F. Little

called as a witness by the Intervenor, having been first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

BY MR. KITCHEN:

Q Would you please state your name, residence and occupation.

A My name is Joseph F. Little. I reside at 3675 South Franklin Street in Cherry Hills Village, Arapahoe County, Colorado. My occupation, I am an attorney at law.

Q Would you please state your particular experience in politics and your background with regard to Amendment 7?

MR. CREAMER: If it please the Court, Mr. Little has testified before in this proceeding, and I believe at the time of his previous testimony Mr. Little's background and qualifications and political experience were gone into at

some length, besides which I think all of us are fully aware that it has been extensive, and I wonder if it is necessary to repeat it? It is already on the record.

JUDGE BREITENSTEIN: Any particular reason for the repetition of this? It was given at the hearing last summer.

MR. KITCHEN: I wasn't certain it had been testified to last summer. If it was, I certainly will not go into it again.

MR. CREAMER: Yes.

Q (By Mr. Kitchen) Mr. Little, did you testify to that subject last summer?

A I believe I did, yes, sir.

Q I believe that as a part of that testimony you stated that you were a member of the group which formulated and presented Amendment 7 to the public in Colorado, is that correct, sir?

A That's correct.

Q As a member of that group, what particular recent history of Colorado did you have before you in formulating and presenting the amendment?

A Well, to start out with, I guess 1932, if that's what you mean, when the people of this state adopted and initiated law apportioning the legislature. Then, in 1938, there were a group of us that proposed, I believe it was a constitutional amendment. At least, it was an initiated measure to do away with this system of voting at large and try to district the state, so that the voters would only have to vote for one candidate for the Senate or House of Representatives. We didn't get enough signatures I believe. I think we failed by about 3 or 4,000 votes to get that amendment on the ballot.

Then, in 1954, I think it was the next—no, 1953—the

General Assembly adopted some changes in the apportionment law, and in 1954 there was a constitutional amendment somewhat similar to Amendment No. 7. I don't believe it had the districting provisions in it. That is the prohibitions against more than one senator or one representative per district. That was defeated, and then in 1956 there was another constitutional amendment. I think that was commonly called the "Nicholson Amendment." That would have based the Senate and House of Representatives strictly on population, and again there was no districting provision, and that was defeated pretty badly.

Then, in 1957, we had a committee appointed by the Governor to go into the entire legislative problem, the problem of reapportionment, and then in 1962 we had these two further constitutional amendments, Amendment No. 7 which was adopted and Amendment No. 8 which was defeated.

Q What other state agencies besides the Office of the Governor made and published studies on the reapportionment problem?

A I believe it was—I know the League of Women Voters put out one.

Q I am talking about government agencies.

A Government agencies. Well, there was the Colorado Legislative Council that put one out in 1961.

Q Now, in addition to that, there were other non-governmental agencies and organizations who were studying this problem in this period of time, is that right?

A That's correct.

Q Was the information which you had in front of you relative to the Intervenor's Exhibit C, the report of the Executive Committee of the Governor's Commission, is that the report that you are talking about that you had before you? Exhibit C, which is already in evidence?

MR. CREAMER: Report who had before whom, when?

JUDGE BREITENSTEIN: Mr. Kitchen, that question was pretty indefinite with no antecedent to the several pronouns.

MR. KITCHEN: Well, Your Honor, the prior question had to do with being a member of a group which formulated and presented Amendment No. 7, and the witness has testified as to the matters which they considered, and I am asking the witness if he is referring to Exhibit C as on of those matters.

MR. CREAMER: If it please the Court, this is rather a fundamental objection. Amendment 7 is treated by this question as though Amendment 7 were a proprietary item of some kind, belonging to a group which defined it.

Sometimes legislative history is useful in interpreting legislative enactment, but legislative history is not interpreted to go behind an initiated measure which is presumptively originated only in one place, that is popularly.

What the group of which Mt. Little was a member thought if and when it drafted this amendment has practically no meaning whatsoever. The only thing that may be utilized to determine what is meant by a popularly initiated or referred measure is whatever may be contained within that measure.

Inasmuch as it may not be assumed that Mr. Little or anybody else had a proprietary right of formulation or more particular than general information concerning the matter, his opinion when he formulated it really, with deference to that opinion, which is most useful in many areas, is not governing in these circumstances.

JUDGE BREITENSTEIN: Mr. Creamer, the members of the Court are, I am sure, aware of the difference between legislative history and the history relating to the

initiation and adoption of an initiated constitutional amendment, and having that in mind the objection will be overruled.

MR. CREAMER: Very well, Your Honor.

JUDGE BREITENSTEIN: Read the question.

(The reporter read the pending question aloud.)

MR. KITCHEN: Let me withdraw the question and recast it.

Q You have referred to a study which was made by the Governor's Commission, is that correct? Were you a member of that commission?

A I was.

Q Is the report of the Executive Committee of that commission, the Exhibit C which has been admitted in evidence herein?

A I am not sure what Exhibit C is. I would have to see it.

Q Exhibit C is in seven volumes and entitled, "Governor's Reapportionment Commission Report of Executive Committee, Ed C. Johnson, Chairman." Is that the committee you are referring to?

A Yes, sir. Well, now, that wasn't the one. I was referring to, but that I understand was before the committee. What I was referring to was the Colorado legislative council research publication, "Reapportionment of the Colorado General Assembly". That's the copy I have. That's what I thought you were referring to.

MR. KITCHEN: And that I believe has already been admitted as Amicus Curae Exhibit A, is that correct?

MR. CAROSELL: Number 1.

MR. KITCHEN: Oh, I see.

Q You were referring to what has been marked as Carosell Exhibit No. 1, is that correct?

A That's right.

Q Now, in addition to this particular sequence of events with regard to reapportionment which you refer to, what other factors were considered by your group in formulating Amendment No. 7?

A Well, first of all we wanted to make—

MR. CREAMER: May I ask one question or make one inquiry or objection or whatever it may be? It is a little informal. We did have the problem first of the antecedent and now it turns out to be the formulating group and then there was my other objection which was overruled, but if we are discussing the problem of the formulating group, may we know who or what the formulating group was?

JUDGE BREITENSTEIN: I think that's desirable, Mr. Kitchen. That's what I meant when I made the comment before I wasn't quite sure what groups and what documents we were talking about.

MR. KITCHEN: I was attempting to shorten it, Your Honor.

JUDGE BREITENSTEIN: I think we better have the groups responsible for these various reports clearly identified.

MR. KITCHEN: Yes, sir.

Q Now, you are a member of the Board of Directors of the Federal Plan for Apportionment, Inc., is that correct?

A Yes, sir.

Q Were you a member of a committee which participated in the drafting of Amendment No. 7?

A Yes, sir.

Q And do you recall the other members of that committee other than yourself?

A You were one. Governor Johnson was one, and I can't recall.

Q Governor Vivian?

A Yes, sir.

Q Former Chief Justice Alter?

A Yes, sir, mostly the lawyers in the group along with Governor Johnson.

Q Now, what factors or what items were considered by this group in the formulation of Amendment No. 7?

A Well, first of all we wanted to get rid of the provision in the state constitution which was never followed that there had to be a state census every five years, which we did.

Secondly, we wanted to get rid of the situation where the number of senators and representatives in our larger counties; the number of candidates, was so many, but most voters didn't know whom they were voting for, and the result of it was that the candidate whose name began with A, B, or C, or who was on the top line of the voting machine in the primary election, were successful regardless of their qualifications.

We wanted to get some intelligent—well, we wanted to give the voters an opportunity to exercise an intelligent choice.

Now there were those things. The next thing we had to consider was the fact that this is one of the fastest growing states in the country. There had been a considerable complaint about the fact that the House—the populous sections of the state were not properly represented.

On the other hand, there were other factors, too, to take into consideration, such as the state's welfare, the topography, its historical background, the various sections of the state which were created by mountain ranges. In other words, topography.

And, then, in addition to that, we had some other factors which had to be considered. First of all, on the one hand, we had many complaints and arguments being made that Denver was being discriminated against in the apportionment of the legislature, and on the other hand, there was considerable discrimination on the other side, too. Pretty hard—I wouldn't classify it exactly as discrimination, but there were certain advantages which the City of Denver and other home rule cities of this state enjoyed over the other areas of the state, which were also creating considerable unrest and confusion and dissention.

There were a whole lot of others. There was, for instance, you have got ethnical grounds, language barriers. In many of the counties of this state, particularly along the New Mexico border, Spanish is the language. It should be that a legislative, a senatorial, district should be somewhat homogenous and, well, I just couldn't consider all of those.

Q You were talking about home rule cities. Could you describe for the record, or did you analyze, the number of home rule cities in the State of Colorado?

A I did remember that number. I think somewhere around 27. Now, that's my vague recollection.

Q I will hand you a memorandum and ask you if it refreshes your memory.

A 25.

Q What is the total population of those home rule cities?

A 974,753.

Q What is the population of home rule cities within the metropolitan areas of Denver; and I do not think you were here when we defined those as the City and County of Denver and Adams, Arapahoe, Jefferson and Boulder and El Paso and Pueblo.

MR. CREAMER: If it please the Court, it is obvious that the witness does not know or remember these statistics. If it is pertinent to have them in the record, may they just be read into the record and may we simply stipulate that those are the statistics?

JUDGE BREITENSTEIN: Yes. We will concern ourselves with that tomorrow, Mr. Creamer.

The Court will recess for the day now. The Court will be in recess until 9:30 tomorrow morning.

(The Court recessed at 4:30 o'clock p.m. to reconvene at 9:30 o'clock a.m. the following day.)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

ARCHIE L. LISCO, et al,

Petitioners,

v.

STEPHEN L. R. McNICHOLS,
etc., et al,

Respondents.

and

WILLIAM E. MYRICK, et al,

Plaintiffs
and
Petitioners,

v.

THE FORTY-THIRD GENERAL
ASSEMBLY OF THE STATE OF
COLORADO, et al,

Respondents
and
Defendants.,

FEDERAL PLAN FOR APPOR-
TIONMENT, INC., et al,

Intervenors.

CONSOLIDATED

Civil Action No. 7501

Civil Action No. 7637

OFFICIAL TRANSCRIPT

VOLUME III

Morning Session
May 7, 1963

Proceedings had before the HONORABLE JEAN S. BREITENSTEIN, HONORABLE ALFRED A. ARRAJ, and HONORABLE WILLIAM E. DOYLE, in Courtroom A, Main Post Office Building, Denver, Colorado, beginning at 9:30 o'clock a.m., on the 6th day of May, 1963, as continued at 9:30 o'clock a.m., on the 7th day of May, 1963.

APPEARANCES:

As heretofore noted.

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JUDGE BREITENSTEIN: Proceed, Mr. Kitchen.

MR. KITCHEN: If it please the Court.

JOSEPH LITTLE

having been previously sworn, continued to testify as follows:

DIRECT EXAMINATION

(Continued)

BY MR. KITCHEN:

Q Mr. Little, you are the same witness who was on the stand at termination yesterday afternoon?

A I was. I am.

Q In order, Mr. Little, to take up on your testimony, I believe that you were expressing your opinion as to the factors which were involved in the apportionment of the Senate under Amendment 7. Would you please state what those factors were and are?

MR. CREAMER: I don't mean to interrupt, but I think he was giving some statistical data, and we had reached a point where we were discussing the method of putting it in.

MR. KITCHEN: I am going to come back to that, but we could settle that now.

MR. CREAMER: That's quite all right. I think perhaps we had made some suggestion it would perhaps be faster just to introduce it, the document.

MR. KITCHEN: If it please the Court, I have had marked as Intervenor's Exhibits E and D respectively, an exhibit which is a tabulation of Colorado home rule cities

and their populations, and a tabulation of the registered voters and total population of each county in the state, and if by stipulation we may have these admitted, we can proceed.

JUDGE BREITENSTEIN: You are offering those in evidence?

MR. KITCHEN: Yes.

JUDGE BREITENSTEIN: They are Intervenor's Exhibits D and E?

MR. KITCHEN: Yes, sir, Your Honor.

MR. CREAMER: The only objection would be to the table marked, "Table of Percentage of Registered Voters." I think it is a problem of relevancy, but probably like all the other statistical matter something for the Court to utilize as it sees fit.

JUDGE BREITENSTEIN: Very well, D and E will be admitted.

MR. CREAMER: Mr. Kitchen, which one is D and which E?

MR. KITCHEN: Exhibit D is a tabulation of—I am sorry, Exhibit D is the "Percentage of Registered Voters to Total Population."

MR. CREAMER: D is the percentage of registered voters?

MR. KITCHEN: D, yes, and E is the "Tabulation of Population of Colorado Home Rule Cities."

MR. CREAMER: Thank you.

JUDGE BREITENSTEIN: Mr. Kitchen, I would like to have someone explain to me before you go on, I see two counties have more registered voters than population. How can that possibly be?

MR. KITCHEN: I am going to ask the witness to explain that.

JUDGE BREITENSTEIN: All right, go ahead.

THE WITNESS: Do you want me to explain that?

JUDGE BREITENSTEIN: I will let Mr. Kitchen do it his way. It seemed phenomenal to me.

Q (Mr. Kitchen) Mr. Little, I would like, if you would please, reiterate the factors in your opinion which were taken into consideration in the apportionment of Amendment 7.

A Well, any apportionment measure, whether it is constitutional or statutory, involves a great number of factors. In other words, it is not just simply a proposition of taking Colorado's sixty-five representatives and dividing it into the 1,750,000 people in the State of Colorado, and say, "We have now one representative for every 27 or 28,000 people," because first of all, population itself is a deceptive factor. It is not absolute. We don't put a voting precinct in a state penitentiary or in an orphanage, and some of the counties which apparently look to be underrepresented may in fact be actually over-represented.

Any political canvasser who punches doorbells, for instance, will find in the process of a canvass—will find numerous parties who are voters in other counties or other states, and yet under the census, and I am reading here from the official publication of the Department of Commerce, Bureau of Census, United States population of 1960 for Colorado, number of inhabitants, and reading on page V, in accordance with census practice dating back to 1790, each person enumerated in the 1960 census was counted as an inhabitant of his usual place of residence or usual place of abode, which is generally construed to be that place where he lives and sleeps most of the time.

In the application of this rule, persons were not always counted as residents of places where they happened to be found by census enumerators. Persons in the armed forces found on military installations were enumerated as residents of states, counties and minor institutions—as in 1950, college students were considered residents of communities in which they were residing while attending college, and it goes on.

Now, specifically speaking, in answer to your questions, we have a queer situation in Colorado. Some counties, and Hinsdale county is one, and Gilpin is another, the actual census figures are less, and that includes men, women and children and incompetents and so on. Those are less than the actual number of votes cast in those counties for the simple reason the counties had a large number of voters, qualified residents, who lived in other counties who voted by absentee ballot.

Let's take specific considerations along that line. El Paso county, the Air Force Academy. It has the Air Force installation, numbering between 15 and 20,000, Fort Carson at which a whole division is now stationed, Ent Air Force Base. It has NORAD. Again, as I say, most of those people are temporarily there. The census counted them as inhabitants of El Paso County. They were probably voters from some other section of the state or nation.

You cannot say that people are entitled to be represented twice. In other words, the man from Gilpin County living in Denver, who votes an absentee ballot, is represented by his representatives from that district and not from Denver.

So, in Colorado you have two things, the counties which have smaller population, or less industry and business or declining industry and business, and governmental installations and so on, are going to show, as Gilpin and Hinsdale, less population than the actual voting population.

On the other hand, counties like El Paso and Denver, because Denver has not only Lowry Air Force Base but we are the seat of state government and I know numerous state officials who keep their voting addresses in other counties, and Denver is also the scene of any large number of federal installations as well as defense plants, with a very high percentage of transient population. What it amounts to in absolute figures is pretty difficult to state. I don't believe you can get an absolute formula for it, but the situation is this so-called disparity between representation and population is not what it appears to be in the figures.

Q Mr. Little, referring specifically to Exhibit D which I just handed you, which is on the table there, Exhibit D—

A What?

Q Exhibit D, the comparison of registered voters.


A Yes.

Q Would you point out to the Court where this factor shows up particularly with regard to El Paso County?

A Well, El Paso County shows the number of registered votes at 56,000, a total population of 143,000. The percentage of qualified voters to total population of 39,000—

Q Thirty-nine percent.

A Thirty-nine percent, I beg your pardon, 39,3072. Just along that line, let's contrast it with another one. Here is Gilpin County. These figures are for the registered voters for 1962. I have the tabulation for '60 and it's practically the same. Gilpin and Hinsdale showed just a variation of two or three. In Gilpin County the percentage of number of registered voters to a total population is one hundred five per cent, and in Hinsdale County it is two hundred eighty registered voters to two hundred eight total population or one hundred thirty-four percent.



Q What is the statewide average relationship between registered voters and census population?

A The number of registered voters in the state is 879,075. The total state population is 1,753,947, or an average of 50.1 per cent.

Q With regard to Denver specifically, I believe you had stated earlier your experience in politics in Denver and so on, so I am going to ask you what in your opinion is the percentage relationship of census population which would be accounted for by persons who are not registered in Denver, if you can express an opinion?

MR. CREAMER: If it please the Court, this isn't a matter of opinion. It is a matter of statistical fact. One does not have opinions relative to a statistic. If Mr. Little knows what the relationship is, I suppose he could testify. It isn't the problem of an opinion at all.

MR. KITCHEN: Your Honor, Mr. Creamer quite generously yesterday conceded Mr. Little's qualifications as an expert, which were gone into in detail in his first hearing.

MR. CREAMER: No, I didn't.

MR. KITCHEN: One of his qualifications was that he had been for many years a precinct committeeman in Denver and County Chairman.

JUDGE BREITENSTEIN: Yes, I remember all that, but as I understand your question—perhaps I didn't understand it—it seemed to me Mr. Creamer's objection is good. It is a matter of statistics. It shows here Denver has a certain number of registered voters and certain population and the percentage is a certain amount. Perhaps you'd better rephrase your question.

MR. KITCHEN: All right.

Q (By Mr. Kitchen) Mr. Little, in the course of your activities that you were speaking of in regard to canvassing in Denver, did you obtain certain information which would indicate the relationship of resident qualified electors in Denver to actual population?

MR. CREAMER: Well, if it please the Court, this is a completely impossible question. In the first place, Mr. Little is not shown to have any knowledge of residence, domicile or anything else of voters. It isn't shown he canvassed anybody at all. Mr. Little has been a gentleman long engaged in politics. Several of us have from time to time, I think.

MR. KITCHEN: I will be happy to go into the witness' qualifications.

MR. CREAMER: It is not a problem of qualifications. It is a problem of simple statistics. One doesn't express an opinion of statistics. Either one knows it or doesn't.

JUDGE BREITENSTEIN: I think essentially that goes to the weight of the evidence to be given in this trial to the Court. Go ahead.

MR. KITCHEN: Repeat the question.

(The reporter read the pending question.)

Q (By Mr. Little) Did you arrive at such a conclusion, Mr. Little?

A Mr. Kitchen, that's a very variable situation. You take qualified electors, that would have to exclude minors, insane persons and so on.

Q I am referring to the number of persons, such as the persons at Lowry, the government employees, residents elsewhere, and the residents of hospitals who are otherwise qualified voters except for the fact they were not electors.

JUDGE BREITENSTEIN: Mr. Kitchen, stated that way why aren't you bound by the figures which you presented on this exhibit received in evidence? That shows a percentage on a statistical basis. I can't see what you are trying to get at in addition to that.

MR. KITCHEN: Well, Mr. Little has testified as to these persons, Your Honor, and I am trying to get his conclusion as to the relationship, what effect that have on the over-all figure.

JUDGE BREITENSTEIN: Why don't you ask that sort of a question?

MR. KITCHEN: All right.

Q (By Mr. Kitchen) Would you please state what effect these factors have on the over-all figures, in your opinion?

A Well, they would materially alter a representation which would otherwise be based on census figures.

Q All right. Now, I think I interrupted you with regard to further explanation of population factors. Did you have anything further on population factors?

A Well, I mentioned the fact that population, while it is a very decisive factor, is not an absolute factor. I might also state this, that the American Political Science Association allows a variation in population of fifteen per cent.

MR. CREAMER: Just a minute, I really think that what the American Political Science Association allows is hardly, one, germane, two, significant, or, three, to all of his qualifications, to allow Mr. Little to state what it is, is really out of the realm of proper evidence.

JUDGE BREITENSTEIN: Isn't that hearsay?

MR. KITCHEN: The objection wasn't based on hearsay.

THE WITNESS: I wasn't here for all the evidence. I don't know if the pamphlets put out by the League of Women Voters—

MR. KITCHEN: No, sir.

A (Continued) I might say, Amendment No. 8, which was voted on and decisively defeated, allowed a variation of census figures so as to allow the very things we are talking about of thirty-three and a third per cent above the strict population ratio of both Senate and House and a variation from thirty-three and a third per cent to fifty per cent below the strict population. Thirty-three and a third as to the House, as I recall it, and up to fifty for certain Senatorial districts, again to allow for situations we are talking about, which means certain districts under Amendment No. 8 could have had a population of 38,000 and others a population of 15,000. Another thing we have to consider in a—

MR. CREAMER: I don't believe there is even a question pending at the moment.

JUDGE BREITENSTEIN: I don't either.

Q (By Mr. Kitchen) Going back now, you have testified as to population as one of the factors, and I believe, Mr. Little, you were proceeding to answer my previous question as to the other factors which were involved.

A Well, the next would be topography. This state is entirely different from any other state. I am talking from a practical operation of a political entity.

For instance, let's take Jackson County. There are times in the year when Jackson County, the only way to get in, is go to Fort Collins, up to Laramie, Wyoming, and back to Walden, because Cameron Pass is closed and that's it. It's a part of Colorado. It has got to be fitted into some political pattern.

The same thing is true with the San Juan area. There have been times the only way to do it was to go into Utah, with Red Mountain and Wolfe Creek Passes closed. Yet, again, it must be fitted into a state representative pattern.

Again, we must realize not only do we have these mountains, the highest in the entire country, dividing it up, but in addition to that, in the east we have a vast plains area.

Now, good political practice requires voters be allowed and given the opportunity to acquaint themselves with the candidates and the qualifications, and by the same practice candidates like to get around and see as many voters as they can, so there has to be a limit even to a plains representative and senatorial district.

We have counties in this state, like Las Animas County, the largest, which is larger than many individual eastern states and larger than some combinations of eastern states. It is not simply a question of providing a mathematical formula. It could be done. You could reduce population and area both to mathematical formulas, if you wanted to determine representation on that ground alone, that in addition to that there are others.

Q Before you leave the question of area and practical political effect, what specifically effect has this high topography had upon campaigning, for example, in the State of Colorado?

A We used to set up speaker's bureaus, and one of the first things we would do in formulating an itinerary for candidates was to see to it all the high areas and the areas considered inaccessible should be visited first, so the candidates could get in and out. That meant when you were formulating a representative district, you tried to make those districts, the boundary, coincide with the various divides, and that same thing holds true in other considerations, by senatorial and representative districts.

We have the Fourth Congressional District, which is only about a third the population of the Second, and I don't think anybody in the state would dream of changing it for the simple reason it combines the Colorado River basin, completely surrounded and cut off from the rest of the state by the Rocky Mountains, the Continental Divide, and again an elevation, a mean elevation, for the entire district of some 6,000 feet.

Now, again, you can relate that to senatorial districts, because many of our senatorial districts have historically and of necessity coincided, or groups of senatorial districts or districts themselves have coincided with river basins, and just another practical matter along that line, we had in 1937 some very important water legislation passed, and among other things we had a situation where if Denver or the eastern plains wanted to indulge in any trans-mountain diversion, compensatory reservoirs should be set up on the other side of the mountains so as to equalize water fall and provide for storage.

Q. Now, does this relate—

A. I am going to come back to something else in a minute, but I want to mention something just here. Your apportionment cannot look to any particular area, but to the welfare and well-being of the entire state. Yet, legislators individually do not represent the entire state. They represent their own constituency and own individual district. It is only collectively that the legislature represents the State of Colorado.

If we were to put this state without any checks or balances in the situation where we would take one representative for every twenty-seven thousand or twenty-eight thousand and one senator for every forty or fifty thousand, and simply take population as the sole basis, we would get a legislature which in the interest of constituents the majority would vote to repeal the water legislation which has

given benefit to the entire state, which has given rise to the Big Thompson and Arkansas River diversion and others.

Q Now, you feel, in other words, if the Denver Metropolitan Area had a majority of both houses—do you feel that they might repeal that specific legislation?

MR. CREAMER: If it please the Court—

JUDGE BREITENSTEIN: Objection sustained.

THE WITNESS: Shall I continue?

Q With regard to the question which you testified to previously as to factors, and you mentioned home rule cities, would you please explain that a little further, Mr. Little? I believe you were actually getting into that question when we recessed.

MR. CREAMER: If it please the Court, there is nothing to explain. There is a table of home rule cities. It lists twenty-five of them. It lists their population. It has an asterisk in front of some of them. It has an explanation relative to the asterisk. These are cities in the metropolitan areas and it totals them separately.

JUDGE BREITENSTEIN: They are entitled to have an explanation of their exhibit and have the witness testify and submit it. Overruled. Go ahead.

A Colorado is unique in one respect. I don't know of any other state that has an area like the City and County of Denver, and certainly few states which have the home rule amendment, like we have in the 20th Amendment.

The result is the state legislature, while it is the sole body for the rural areas, nevertheless as far as the home rule cities, much of the legislation which would ordinarily come from the legislature originates not with the legislature for the home rule cities but with the home rule cities themselves.

I don't think it is necessary to explain the rights granted home rule cities under the constitution, but what I want to point out is that the legislature, the General Assembly of the State of Colorado, is not nearly as important to home rule cities with their right of sharing with the state legislature in much domestic legislation as the importance of the state legislature to rural areas.

Q All right, sir, would you please comment as to the division of the Senate under Amendment No. 7 as to the allocation of eight senators to Denver and eight to the surrounding suburban counties?

A Denver has eight senators, and at the present time the three surrounding counties, Adams, Arapahoe, and Jefferson have one each. Because of progress and the growth of this area, situations are occurring which render necessary, vitally necessary, that there must be some balance obtained between those areas, the surrounding counties and Denver.

Last night, I voted in a school election in my school district, and the sole question was the loss of tax revenue due to the fact that the 20th Amendment gives to the City and County of Denver powers which are not shared by any other county or city in the state and which are akin only to those of the state legislature.

In other words, every time the City of Denver annexes a territory, it changes the boundaries, not only of senatorial and representative districts, and it does that apart from any amendment or law we have now except Amendment No. 7, but also congressional, judicial district boundaries, as well as school boundaries, and the less assessed valuation there is in these other counties and the more Denver has.

I don't say that as criticism, but what happens is the three surrounding counties are virtually at the mercy of Denver, which if the situation continues it means those

counties are going to be cut in half and eventually forced out of existence because of financial inability to continue because of Denver's annexation.

Now, Amendment No. 7 attempts to equalize that situation by giving each of the three surrounding counties an additional senator and also Boulder County because of its exceptional growth. For instance, the governor vetoed an annexation bill which would have given the City and County of Denver and possibly some other cities the right to go in and annex and incorporate areas surrounded by the City of Denver.

Q Excuse me, that was unincorporated?

A Yes, sir.

Q Was there any annexing of incorporated areas?

A The annexing of Glendale, yes, sir.

Q Has there been a history of conflict between Denver and surrounding areas?

A That's a continuing thing, yes. I do not like to use the word "conflict". It is just simply—you must say, I guess, conflict. It is a conflict between the growth of Denver and the identity and individuality of these surrounding counties caused primarily by the tremendous population growth in this area.

Q Now, then, was Amendment 7 then passed in your opinion in specific light of this legislative situation between Denver and its surrounding counties?

A That was one of the reasons for it, yes.

JUDGE BREITENSTEIN: I am bothered about the answer to that question. I am more bothered about the question. The question was, was it passed because of this. I can't conceive how you, Mr. Kitchen, or the witness or anybody else can know what was in the back of the minds of the people who voted on Amendment No. 7.

THE WITNESS: May I amend my answer and say that's one of the reasons why it was drafted the way it was?

JUDGE BREITENSTEIN: That's better. As far as I am concerned, I am not going to guess at what any voter had in his mind.

THE WITNESS: Well, I am sorry. I didn't quite appreciate that point.

Q Keeping in mind, I think, you testified at the previous hearing, and generalities as to the other factors involved and the opinion of this court which said that generalities were not sufficient, would you have any comment as to the other factors that you mentioned as a basis for Amendment No. 7?

MR. CREAMER: If it please the Court, this is the sixth, seventh or eighth time this identical question has been asked in this examination. We have tried as a matter of courtesy not to interrupt more than seemed imperative, but we have already got an hour and half in the previous record of this same testimony. We have gone almost word for word with what was stated before, except before it was stated what was going to happen under Amendment No. 7, and now it is stated what has happened. Every question in this transcript is a simple variant of, "Would you please state what other factors you have considered?" Mr. Little has stated factors until we are blue in our respective faces. In any respect, it is unreasonable to repeat the same matter over and over again.

JUDGE BREITENSTEIN: Let's try to avoid repetition.

MR. KITCHEN: Yes, I am asking the witness if he can give us any other factors with relation to these factors and not repeat the general statement that was introduced before.

A Well, that would—I don't quite understand, but

if it is proper to put it this way, I think any apportionment measure should take into consideration the fact that the legislature as a whole represents the State of Colorado and every activity connected with it. .

For instance, it should, if the legislature is to be well formed and well rounded, it should have not only expert but practical experience. It should number among its members not only experts but also those who have practical experience in such matters as water, agriculture, stock raising, the tourist industry, lumbering, mining and all the other various pursuits that go on in the State of Colorado.

If we were to look at this thing entirely on the basis of population alone, we might overlook the fact that some of these other basic industries that exist in the far corners of the state and on which these populous centers depend might suffer to the detriment of the entire state.

Q All right, sir, now, finally, with regard to these factors which you have mentioned, would you please state how these matters were brought to the attention of the people of the State of Colorado and the passage of Amendment No. 7?

MR. CREAMER: I do object to this. There is certainly no propriety for rehashing the campaign which was given by Mr. Little and his corporation to get Amendment No. 7 passed. It is an interesting public performance, but it is not pertinent.

MR. KITCHEN: Your Honor, if I may, we have some law on that subject.

JUDGE BREITENSTEIN: Just wait a minute, Mr. Kitchen, we can't conduct a campaign for Number 7, for or against it. We have been very lax in the reception of evidence here, much testimony, and we are willing to hear this, but we don't want another speech from the witness. This matter can be argued at the proper time. If you

have some facts, we would like to have those facts, and again I suggest that we cannot enter the minds of the voters and decide why they voted for or against it, so if you confine your questions to facts, we will hear it, and I do hope repetition can be avoided. Go ahead.

MR. KITCHEN: Well, Your Honor, I should like to state this is the purpose of the question. There was—

JUDGE BREITENSTEIN: Go ahead and ask your question and then we will have a ruling.

MR. KITCHEN: All right.

Q (By Mr. Kitchen) Mr. Little, were these factors which you have mentioned brought to the attention of the people of the State of Colorado during the fall of 1962 in connection with their consideration of Amendment No. 7?

A Yes.

Q And would you please state the nature of this information very briefly?

A Well, the matters I have testified to, the factors why 7 should be adopted, were particularly given the most widespread publicity. Public meetings, radio, television, newspapers, publications, advertising and the like, and also the reason why Number 8 should be defeated, which was the opposing measure.

Q Now, in your political experience in this state, how did this initiated campaign compare as to information to the public and public awareness with others?

MR. CREAMER: If it please the Court—

JUDGE BREITENSTEIN: Objection sustained. You don't need to pursue that any further. The objection is sustained.

MR. KITCHEN: Nothing further. Thank you.

CROSS-EXAMINATION

BY MR. CREAMER:

Q Mr. Little, the redoubtable Amendment No. 7 in essence states as to the House of Representatives that it shall be divided into 65 districts as nearly equal to population as may be, is that correct?

A That's my recollection of it, yes.

Q I think that's approximately the language of it.

A Yes.

Q And there isn't any factor in the House of Representatives at all except population set up as a criterion, is there?

A Yes, that is nearly equal population. That qualifying phrase, "as may be", would cover most of the things I am talking about here.

Q You mean your phrase, "as may be," allows a complete juggling of population?

A Not necessarily. There has to be a reasonable basis for the variances. I wouldn't call it juggling.

Q And then your Senate formula just takes the 1953 act, which we have already considered in its validity, and clamps that in as a congressional provision, just referring to it by statute, book and page, and adds four senators and shifts one county, is that correct?

A That's correct.

MR. KITCHEN: I ask the examination along that line be limited. The Court can see what's in the amendment.

MR. CREAMER: You didn't limit anything.

JUDGE BREITENSTEIN: Just a minute, the objection is overruled. I don't want one lawyer interrupting another any more when one is speaking. Go ahead.

Q Now, with relation to the Senate, you took 3 senators and gave 1 to Adams, 1 to Jefferson and 1 to Arapahoe County and then you took another one and put it up in Boulder, and then you froze the Senate perpetually and said these may not be amended, changed or altered by the legislature, is that correct?

A The answer is no.

Q Yes.

A No.

Q The answer is yes?

MR. KITCHEN: I object, Your Honor. The witness answered no.

JUDGE BREITENSTEIN: Now, be still both of you. We are not going to have more of this, two people talking at the same time, and you lawyers might just as well understand it right now, and, Mr. Creamer, we don't want any more arguing with the witness. The witness said no.

MR. CREAMER: The witness is mistaken, if it please the Court.

Q Just a moment, Mr. Little. I will read to you from your amendment and ask you if this is correct. Section 47 said, "The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63613 of the Colorado Revised Statutes, 1953, which shall not be repealed or amended, other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson." Now, the legislature does not have the power to amend or repeal, does it?

A That's correct, but on—

Q I asked you, sir, if it had the power to amend or repeal.

A You asked me if it was frozen. I said no, it was not frozen.

Q Mr. Little, I am asking you if under your amendment the legislature has the power—

JUDGE BREITENSTEIN: Mr. Creamer, I think we thoroughly understand the situation, and I suggest you go to another line of questioning.

MR. CREAMER: Very well, Your Honor.

Q Now, Mr. Little, you have stated that the population of the county of Boulder is illusory because you have stated the census includes the student population in Boulder.

A That's correct.

Q The student population in Boulder is, I believe, approximately 12 to 13,000 in 1960, is that correct?

A I'm not familiar, but I would imagine it would be a fairly close figure.

Q And you have the population of the county of Boulder of some 74,254 in Boulder, including that student population, is that correct?

A At the time of the census, that's correct.

Q So, if you take off the population you say should not be considered, then the county of Boulder has some 62,000 persons, is that correct?

A It does, at the time the census was taken.

Q And you gave to those 62,000 persons a representation of two.

A No, at the time this amendment was adopted, the population of Boulder County is greatly increasing, and

we felt apportionment was not only a question of the immediate situation but also could take into consideration any reasonable increases.

Q Mr. Little, the population of Adams County is increasing 199 per cent per decennium, the population of Jefferson 127 per cent, the population of Arapahoe at 117 per cent, the population of Boulder at the rate of 55 per cent. How do you determine that Boulder is to be allowed something to anticipate future growth while you freeze the remainder of the state?

MR. KITCHEN: I will object to the question as not a correct statement of any facts in the record.

MR. CREAMER: On the contrary—

JUDGE BREITENSTEIN: Just a minute. The objection is sustained, not on the ground made, but because it is purely an argumentative question.

MR. CREAMER: Very well, Your Honor, I had thought the freezing of the matter was perhaps not argumentative.

Q Now, Mr. Little, you have made the statement that Boulder's student population justifies apparently the allocation of a senator to Boulder. Colorado Springs, or more accurately, the county of El Paso, has 143,742 persons, but you say some of these are military persons. Therefore, they must be discounted and therefore the representation in El Paso County is 71,000 per senator while in Boulder County it is 37,000 per senator. Why do you make this differentiation in transiency in population if it is a factor?

A You better recheck your figure.

Q I am checking. El Paso has 143,742 persons as per exhibit before this Court. The County of Boulder has 72,254 persons. Dividing 74 by 2 is 37,127, and dividing 143,742, by 2 is 71,000, so we have 71,000 per senator in

El Paso County and 37,000 per senator in Boulder, both of which you say are transient population.

A I think you heard my testimony on direct. I think it was to the effect that El Paso County had a number of installations which reduced its qualified elector population down considerably. El Paso County's number of registered voters, according to Exhibit D, is 56,000 registered.

Q I am not talking about registered voters. I am talking about the population of the county.

MR. KITCHEN: Object. If the witness has an answer, I would think counsel would allow him to finish his answer.

JUDGE BREITENSTEIN: Yes, the witness can finish his answer, Mr. Creamer.

MR. CREAMER: If it please the Court, I wish the witness might be instructed to answer the question. He largely narrates and orates.

JUDGE BREITENSTEIN: You asked a good question. He can give an answer to it. Go ahead, Mr. Little.

A The answer is this, you are deducting only from Boulder County or you are considering only in Boulder County the students of the University of Colorado, whereas in El Paso County you have got to deduct at least—well, you have got to deduct all of the Air Force Academy, the 15,000 personnel there, all of the soldiers at Fort Carson, all of the personnel at Ent Air Force Base and Peterson Field and NORAD, and that's a considerably larger number than the people in Boulder.

Q Why do I have to deduct them?

A Because they are not residents, may not be residents. I can't say they aren't. At the same time I can't say that the students at the University of Colorado are not or some of them, at least, not residents of Boulder, Colorado.

Q You cannot state that any student at the University of Colorado is or is not a resident or any soldier is or is not a resident.

A Any particular one, no.

Q You simply don't know how many are or are not, do you?

A That is correct.

Q There is no legal impediment whatsoever to a soldier having been within the state the proper period of time registering and electing to become a citizen and resident of the State of Colorado?

MR. KITCHEN: I will object to the counsellor asking the witness for a legal opinion.

MR. CREAMER: I thought he was a political expert.

JUDGE BREITENSTEIN: Objection sustained. Go ahead.

Q Is there any objection to a student being registered?

A None whatsoever.

Q Is there any objection to one of the persons at the Academy being registered?

MR. KITCHEN: Objection on the same ground.

JUDGE BREITENSTEIN: Overruled on that. Go ahead.

Q Is there any objection to anybody at the Academy being a registered voter?

A No.

Q Is there any objection to any one of the 15,000 employees?

A If they have a qualification to become a qualified voter and elector of Colorado, that's it.

Q And you do not know if any of these people are or are not or what number?

A Partly, yes, we know it from the number of registered voters in El Paso County.

Q Your table doesn't limit this to persons in the military or employees at the Academy or residents at the Academy?

A I would assume most of them would not be considered qualified voters. Otherwise they would be registered.

Q You will assume this. How do you know whether they did or didn't register?

A I don't know.

Q Very well. Now, Mr. Little, you have testified, I believe, specifically that the county of Las Animas is a large county, larger than some states. It has 19,983 people.

A That's right.

Q It has one representative—I mean one senator and one member of the Senate.

A George, I don't know. Excuse me, Mr. Creamer, I don't know whether it is alone or with another county.

Q Now it constitutes under this apportionment the 23rd Senatorial District.

A All right.

Q The county of Pueblo, immediately to the north, has 118,707 persons. It only has two senators or one for 59,300 persons. Can you tell me upon the basis of all the factors that you have discussed why this relationship of three and one-half to one obtains with relation to these two counties.

A. I have not gone in the historical ground. I can say this, that Las Animas County is one of the southern tier of counties, but a large group, a large portion of minority groups, a substantial group, I mean, of Spanish voters. Also, it covers a large area or territory of ranches, coal operations, railroad center and the like, and I think, taking into consideration its population and language groups and its varied industries, as well as its area, that it can quickly said to be entitled to one senator.

Q How do we determine it is entitled to one senator, Pueblo is entitled to two senators for roughly three and a half times the population?

MR. KITCHEN: Object to the question as an incorrect statement of facts.

JUDGE BREITENSTEIN: He hasn't finished the question. Why don't you let him finish?

MR. KITCHEN: I beg your pardon.

MR. CREAMER: Let's start all over again.

JUDGE BREITENSTEIN: Let's start all over again.

Q (By Mr. Creamer) Mr. Little, Las Animas, you say, with 19,983 persons, is entitled to one senator as compared to Pueblo County with 118,707 persons, having two senators, each of whom represents 59,353. Now, can you state what logical relation there is between 59,000 per senator in Pueblo, immediately to the north, and 18,000 or 19,000 in Las Animas, immediately to the south?

A I gave you one situation on it, Mr. Creamer, that I thought.

Q Yes, you said people speak Spanish.

A I said more than that. I said it contained within it industries. It is a sizable railroad center. It also is a great ranching area and the other thing is a terrifically

large area for any candidate to possibly cover in a campaign.

Q And why does this justify its having three times the representation?

MR. KITCHEN: Objection, Your Honor. It is argumentative with the witness. The witness has answered the question.

JUDGE BREITENSTEIN: Objection sustained.

Q Can you tell me, Mr. Little, why the county of Las Animas with 19,983 persons receives one senator, and the county of Larimer with 53,343 persons, being also a single county, and I believe of some size, receives one senator?

A Well, as I see this chart here again, Mr. Creamer, the county of Las Animas has 11,000. Larimer has 27,000. It is about two to one, or a little better than two to one.

Let me say this, if you are going to go in there and start picking out mathematical difficulties and make those the entire deal on it, then you are not considering any of the other factors that I mentioned in my direct testimony. I don't see any reason for going in there and saying all of them. I think I have covered that situation in my direct testimony. There are a whole lot of factors besides population only.

Q And I am trying to find out how you apply any one of these factors. Can you state any basis, given the fact that there are topographical differences in Colorado, given the fact there are economic differences in Colorado, given the fact that there are social differences in Colorado. Can you state any method where there could be derived in logic or by any formulation the particular distribution of the Senate which is made by Amendment No. 7.

A I think you have answered that question when you are given the facts that there are social differences, given

the fact of topographical differences and other differences, yes. It is justified.

Q Is there any particular reason why this distribution is necessary?

A Mr. Creamer, let me answer your question this way. One of the biggest and most compelling reasons is this, the people of the State of Colorado will not and did not approve it. In 1954, 1956, an amendment was submitted, putting the House and Senate both on population. It was defeated about 359,000 to 150,000. We can talk about all the theoretical differences we want to. This thing has got to be practical and realistic and the most beautiful theory on the ballot is worthless if the people won't vote for it. This is still a democracy. The thing you are arguing for here, the biggest thing I can say, is the people voted against it.

Q Mr. Little, the people favored the 14th Amendment.

A I—

JUDGE BREITENSTEIN: I wish the counsel on both sides and the witness would remember that the purpose of adducing testimony is to get facts, and there will be opportunity afforded to both sides to argue, and I hope we will be able to avoid argument.

Q Mr. Little, is there any way that you can say that the change of any one senator or any more than one senator on the basis on which you say this distribution is made would have been wrong or that the subtraction or addition in any particular district of a senator would be justified?

A Mr. Creamer, I don't know, as I understand your question. I want to say this, I think this entire proceeding concerns trivials. The same six counties that will control the Senate under Amendment No. 7 would control it under

any population basis. The same six counties that would control the House of Representatives, the six most populous counties of this state, control it under 7, the same as under a population basis. The same six counties that control the Senate of this state under Amendment 7 would also control it under a population basis. We can argue. We can discuss minor deviations of one kind or another. Some of those are historical. I don't propose to know some of the historical reasons why some senators were allowed in Las Animas County. I do know at one time Las Animas County was a great coal county. The coal mining industry has suffered. Therefore, the county has suffered in population. Whether it will come back or not, it is a question for economists to decide. There have been reasons why it was done, and as I said, the most compelling is the people of the state of Colorado ratified that in 1933. They ratified it in 1962 again.

JUDGE BREITENSTEIN: From now on, this is going to be understood, we are going to ask simple questions and simple answers. I don't want the counsel making a speech when he asks a question or the witness making a speech when he answers. That must be understood from now on out.

As I said many times, we are going to have plenty of opportunity to argue this case. Now, go ahead.

MR. GINSBERG: If it please Your Honor, I have a suggestion to make. I believe we have had adequate testimony and opinion of experts. We have had their statement that Mr. Cottingham made, Mr. Little made, "It don't make any difference, we are dealing with trivial matters." I think we get down a question of law now, as certainly this Court is best fit to consider.

I think we are wasting time now by a circuitous expression of expert opinion that don't go to the meat of the legal question involved here at all. I concur fully with Your Honor's suggestion, even more, that they be short. My suggestion is that they be curtailed completely.

MR. CREAMER: I would think I concur entirely in the matter. In fact, I think we will not examine Mr. Little at all further.

JUDGE BREITENSTEIN: Very well, any other examination of this witness?

MR. HARTHUNG: We have no questions.

MR. ZARLENGO: No questions, Your Honor.

JUDGE BREITENSTEIN: Mr. Kitchen?

MR. KITCHEN: Nothing further, and thank you very much, Mr. Little.

JUDGE BREITENSTEIN: That's all, Mr. Little. (Whereupon, the testimony of witnesses during this proceeding was concluded.)

REPORTER'S CERTIFICATE :

I, Donna G. Spencer, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and did record in shorthand the proceedings in the foregoing matter; further, that I thereafter reduced that portion of my shorthand notes reflecting the testimony of the witnesses to typewritten form, comprising the foregoing official transcript of testimony;

Further, that the foregoing official transcript of testimony is a true, accurate and complete record of the testimony of the witnesses given during the proceedings set forth.

Dated at Denver, Colorado, this 31st day of May, 1963.

/s/ Donna G. Spencer

Donna G. Spencer

Certified Shorthand Reporter

3. Affidavit of Edwin C. Johnson

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

ARCHIE L. LISCO, et al,

Petitioners,

v.

STEPHEN L. R. McNICHOLS,
etc., et al,

Respondents.

and

WILLIAM E. MYRICK, et al,

Plaintiffs
and
Petitioners,

v.

THE FORTY-THIRD GENERAL
ASSEMBLY OF THE STATE OF
COLORADO, et al,

Respondents
and
Defendants.,

FEDERAL PLAN FOR APPOR-
TIONMENT, INC., et al,

Intervenors.

CONSOLIDATED

Civil Action No. 7501

Civil Action No. 7637

**AFFIDAVIT OF
EDWIN C. JOHNSON.**

CITY AND COUNTY OF DENVER

STATE OF COLORADO

ss.

Comes now EDWIN C. JOHNSON, of lawful age, and
being first duly sworn, upon his oath, deposeth and saith
as follows, to-wit:

I.

I am the same person who appeared as a witness in

these proceedings on the 30th day of July, 1962. May I express my deep gratitude to this Honorable Court for making it possible for me to submit this affidavit.

II.

In this additional statement, I shall endeavor to be specific on matters which were referred to in generalities in my previous testimony. This Honorable Court has said that "reliance on generalities is misplaced when a case must be decided on the basis of specific situations". In harmony with this keen observation, I wish to commend the Attorney General and special counsel for the State upon the specific information developed and supplied through their witnesses. Seldom has so much pertinent and reliable data been presented, as is contained in the comprehensive report of the Denver Research Institute. Nowhere can the details of Colorado history be found to compare to those presented to this Court by the Honorable James Grafton Rogers. I shall make every effort to plow some new ground in my testimony.

III.

With respect to the recent history of apportionment in this state, the people under the Initiative and Referendum, in addition to all levels of state government have generated continuous and intense activity in this area of government following the 1950 Census and not just since the decision in *Baker v. Carr*. This activity and interest resulted primarily from the postwar shift of population into the metropolitan districts. This census report was available officially to the Colorado Legislature for action in 1953. In that year the Colorado General Assembly adopted a reapportionment measure that was strictly in accord with the Colorado constitutional provisions of that date. In 1954 the people of Colorado voted on an apportionment Referendum and rejected it by a vote of 159,188 to 116,695.

It did not carry in a single county. In 1956 the people of this state rejected an initiated amendment proposing to reapportion both houses of the State Legislature on a straight population basis. The vote was 349,195 to 158,204. It lost in every county except Denver and Denver cast 60,733 votes against it. This 1956 amendment, sponsored by a group headed by the Mayor of Denver, is of great significance. The campaign for and against its passage was one of the most bitter of any I have known in my experience of over 40 years in Colorado politics. Prior to this campaign the relationships between persons in the various parts of this state with Denver on apportionment had always been friendly, arising from mutual understanding, agreement and respect. Now, opponents of the 1956 proposal found themselves branded as reactionary tools of the cattle barons and the target of other silly charges. On the other hand, the proponents were characterized as domineering and power-hungry big city bosses. Great antagonisms were created and spread across the state. One result was that gubernatorial candidate Stephen L. R. McNichols stated that one of his first acts, if elected, would be to appoint a Governor's commission to study apportionment, to overcome, if it could, the divisive effects of the 1956 campaign and to recommend a solution which could be supported by the persons in all parts of the state. Upon his election the Governor did appoint such a commission; the results of which are already in evidence. It is noteworthy that the commission did evolve a majority report recommending action along the lines of Amendment 7, while a small hardcore minority held out for substantially the proposal of 1956. The Legislature tried diligently to apportion itself under the impossible provision of the State Constitution of that period. From 1956 to 1962 it had before it in each session numerous reapportionment proposals. However, the Legislature failed to muster sufficient agreement to enact a measure on apportionment or refer a measure to the people for a vote. In my opinion, the chief stumbling blocks

to legislative action were the constitutional inability of the Legislature to solve the problem of districting within multimember counties and the limitation of a total of thirty-five senators imposed by the State Constitution. Thus, it was impossible to shift representation in the Senate to give recognition to the growing suburban counties in the Denver Metropolitan Area without playing havoc with extremely important areas of the state. In my long considered opinion the chief apportionment issue in Colorado has never been urban v. rural. The struggle has been to obtain single member districts on a basis which would balance the forces within the metropolitan districts themselves and between the three metropolitan districts. Whenever in my statement I refer to "metropolitan areas", I am referring to the three metropolitan areas of the state as shown on the maps on page 7-18 of Petitioners' Exhibit 1, which is the United States Census Population Report for 1960 and which described three metropolitan areas, that is, the Denver Area, which includes the City and County of Denver and the counties of Boulder, Adams, Arapahoe and Jefferson, the Colorado Springs Metropolitan Area, which is the County of El Paso, and the Pueblo Metropolitan Area which is the County of Pueblo.

At any rate, when the legislative session of 1962 failed to produce a bill on reapportionment, the people took over once again. During the months of February, March and April of 1962 various state-wide organizations which had been working on this problem, including the Colorado State Chamber of Commerce, the Colorado Education Association, the League of Women Voters of Colorado, the Colorado Cattlemen's Association, the Colorado State Grange, the Colorado Farm Bureau, the Colorado Junior Chamber of Commerce, the Colorado Council of the AFL-CIO, and several others, conducted a series of meetings, conferences

and hearings, attempting to reach agreement on a common proposal. I attended as many of these conferences as possible. The efforts, which were amicable and in good faith, finally broke up along the same lines as the majority and minority reports of the Governor's Advisory Commission of 1958. The result was that two proposals, Amendments 7 and 8, were initiated by the people in 1962. Amendment 8 was almost identical in its effect, if not in details and mechanics of operation, to the proposal of 1956. As the tabulation attached to our Answer shows, Amendment 8 was defeated in every county in the state, the total vote being 311,749 against to 149,822 for. This is strikingly similar to the vote on the 1956 proposal. On the other hand, Amendment 7 carried in every county of the state. It is very unusual in the annals of Colorado politics that any proposal or candidate receive a plurality in each and every county of this diverse state. Especially as to ballot proposals, there is normally a large built-in negative vote. If people do not understand a proposal, they vote "no". I believe that the principal reason for the character of the vote on Amendment 7 is that the issues were very clearly defined, not only by the continuous activities above described from 1953 through 1962, but also in the campaign itself. The proponents of each amendment were highly organized, and they conducted a campaign in every nook and crannie of the state. I myself toured the state as thoroughly as I had ever done in a political campaign, and from early March of 1962 through the election day in November, I averaged not less than a public speech or participation in a debate at least once per working day. Many others on both sides did as well. In addition both proposals were heavily advertised, pro and con, and were the subject of front page editorial treatments by the newspapers of the state. Every communication medium was filled with discussion of this issue for months prior to election day. In short, in these campaigns, the people were intensely interested, fully informed and voted accordingly.

IV.

I would like to say something more about the rational basis for Amendment 7. First of all, a bicameral legislature historically has been preferred by the states. Only Nebraska has a unicameral system. Incidentally, one result in that state has shown that Omaha (Douglas County) and Lincoln (Lancaster County) have held the State of Nebraska to the obsolete property tax as the chief source of revenue for the state. It is my opinion that the bicameral system of the states has been patterned in general upon the system of the United States Government. It begs the question to say that the Federal Congress was originally created by sovereign states. In my entire service in the United States Senate, I represented the people within the senatorial district formed by the boundaries of the State of Colorado and I did not represent the Colorado State Government. United States Senators have been elected directly by the people within state boundaries since the adoption of the 17th Amendment of the Federal Constitution, yet old states have perpetuated and new states have created bicameral legislatures in which, as in Congress, factors other than population were clearly recognized in at least one branch of the legislature. While I understand that the acts of Congress do not bind the courts as to determination of matters under the 14th Amendment, I feel that great weight should be given to the fact that Congress, a co-ordinate branch of government, has recently placed its stamp of approval on the bicameral legislatures of Alaska and Hawaii, both containing senatorial districts with much greater population disparities than those established by Amendment 7. The Admissions Act for Alaska and Hawaii recites that the constitution of each state is "hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified and confirmed." Thus the people, and

their political branch of government, have clearly and continuously followed a rational, deliberate policy in creating two houses of a legislature, one generally on a population basis and the other on a different basis.

Turning to a more specific application, in Colorado the people have a fairly recent example of the reasons for this policy. When I was a member of the Colorado Legislature in 1925, the Ku Klux Klan had taken over political power in the major portions of the state measured by population. This was mostly an urban movement. By reason of their control of a bare majority of the votes in large counties, the Klan dominated the legislature. I well remember that the House Leader had a small flagpole on his desk down front in the Assembly. When it was erect, his gang all voted "aye", and when it was tipped they voted "no". Their majority in the House was three to one. Had it not been for the fact that senators were elected from districts representing different interests, and had a different approach to state problems, the damage to this state and its future development which the Klan could have inflicted would have been enormous. The effect may well have been disastrous. Now, in the proceedings leading to the formulation and adoption of Amendment 7, this experience and others like it were in the minds of our people. Consequently, they provided for mandatory districting, so that, first, carrying a county by as little as one vote would not result in a mass representation of one point of view, and, second, no one highly organized metropolitan area of the state could dominate both houses of the legislature. It is obvious that if both houses of the legislature were on a straight head count basis, the Denver Metropolitan Area would absolutely dominate the State of Colorado. Under Amendment 7, it can dominate the house only. Under Amendment 7 the metropolitan areas of Denver, Colorado Springs and Pueblo have a majority of both houses, but no one of these three can, by itself, rule or ruin. I think this is a wise and highly rational policy.

V.

Another factor which should be considered on the question of the rationality of Amendment 7 is the correlation between the adoption, in 1902, of Amendment XX, the Home Rule Amendment, to the Colorado Constitution, and the situation of county government since that date. In my opinion it is no accident that county boundaries have not been radically changed since 1913. The effect of the "home rule" amendment was to transfer "sovereignty" with respect to local matters to home rule cities. At present, Colorado contains a whole series of constitutions within a constitution. Specifically, in Denver, where the unique situation exists of a home rule city being also a county, legislative problems have arisen which are, with the possible exception of Honolulu and San Francisco, without parallel in American government. Just a few weeks ago, in the 1963 session of the Colorado Legislature, the hottest and most prolonged issue was created by the two bills seeking to authorize Denver and other home rule cities to annex contiguous unincorporated and incorporated areas without the consent of the persons resident within those areas. Again, the fight was not urban v. rural but Denver v. its suburbs. Had these bills become effective, any areas annexed by Denver would not only become a part of the city, but the residents would have been transferred automatically to a different congressional district, a different school district, and different legislative districts without their consent. Incidentally, only one of the bills passed, and it was vetoed by the Governor, who, of course, is elected by the people on a straight population majority basis. This intramural fight, particularly between Denver and its suburbs, has been going on in the Colorado Legislature for years and years, and the People by adopting Amendment 7 assigned eight senators to Denver and a total of eight to the suburban counties of Boulder, Adams, Arapahoe and Jefferson for the particular purpose of balancing the inter-

ests of this home rule City and County with those of its suburbs. That was a wise and rational policy for the voters to adopt.

VI.

Again, as to the suburban counties surrounding Denver, Amendment 7 solved the impasse which had troubled the legislature by increasing the number of senators from thirty-five to thirty-nine and assigning the four thus created to the suburban counties. This had the overall effect, on the urban v. rural issue, of eliminating any major population deviation in the house and, in addition, creating a disproportion in the senate of less than two to one. At the same time, this weighting in favor of the sparsely populated areas is not based on an arbitrary mathematical formula, but is founded on legislative experience, fair play and common sense. A specific example of the importance of weighting in favor of the sparsely populated areas is the water legislation previously referred to in his testimony by Mr. Little. Because of its vital importance in this semi-desert state I wish to mention it again. I was in the United States Senate when the Colorado Legislature passed the water acts of 1937 according to plans which were developed when I was Governor of the State of Colorado in 1936. The Colorado Big Thompson Project and the compensating reservoir theory depended upon the support of Congressman Edward T. Taylor of Glenwood Springs, a former State Senator. Had it not been for the fact that the representative from Colorado's rural areas, particularly the Western Slope, had sufficient power in the Colorado Legislature to obtain compensatory storage in all cases of transmountain diversion, there would have been no Big Thompson Project. It is naive and dangerously wrong to assume that representatives from populous areas will vote funds or support legislation for the development of areas outside their own, except under most unusual circumstances.

Colorado has many undeveloped areas and many areas of past booms in which new developments will occur. For example, in Senate District 6 the counties involved are front range counties which have a long mining history, which has recently been in decline. But any substantial change in technology or in price of any of a number of precious or rare metals or minerals, could change this situation overnight. The changes being made by the Federal Government currently in the structure and price of the silver market, have already had an encouraging effect. The metal uranium was a well known metal prior to 1945, but the change in technology created a major boom in Western Colorado. A similar change with regard to metals known to exist within Senate District 6 could have a deep influence upon the development of this state. It has not been pointed out that during the depression years of the 1930's Senate District 6 was one of the mainstays of a stable economy within the State of Colorado, because of the relative high price of gold. Although the production figures do not reflect a boom in production of gold in this district within that decade, the relative importance of gold production from this district was one of the sustaining influences in this state during that distressing period. The same can be said with regard to many other districts and counties within the State of Colorado. Another example is coal. District 4, Las Animas County, contains vast reserves of coal, and any change of a substantial nature in technology or the market will create a boom overnight in that county. According to current press reports coal is on the threshold of becoming "king" again. That area of the state is also on the threshold of becoming a tourist Mecca for the hot belt states immediately to its southeast and southwest. Another example of a resource on the threshold of development is the vast oil shale deposit underlying the almost entire northwest quadrant of the State of Colorado. I had the pleasure of being a member of a state-wide committee concerning itself with the encouragement of the develop-

ment of this deposit and had occasion to testify on two separate occasions before the House Ways and Means Committee within the last decade as to the potential of this area. It can be said conservatively that within the near future a tremendous economic development of the Grand Valley can be expected with consequential differences in population. The whole point is that the legislature must reflect a membership which will, through the distribution of legislative voices, call attention to the development of these resources of the State of Colorado. I repeat, this problem translates itself into legislative problems. As has already been mentioned in the case of water, if the people of the Denver Metropolitan Area had control of both houses of the legislature, it is unrealistic to expect them to not circumvent the provisions of Colorado Law which require compensatory storage for transmountain diversions. The simple elimination of this provision would emasculate those acts and leave the people of the Western Slope without an effective means of organizing to preserve their water supplies. This would have a direct adverse effect upon the potential development of the Western Slope oil shale reserves. Without an effective rural district voice in the Colorado Legislature, a Colorado "Program for Progress" would be dead.

In previous testimony I have referred to all the matters which a senator from my district from Northwest Colorado must be familiar. While Denver has sent many outstanding and capable men to the legislature, it is not the general rule that these legislators are equipped first to recognize the various problems of rural Colorado and second to deal with them legislatively.

There is no question whatever in my mind that the people of the State of Colorado had these factors in mind when they adopted Amendment 7. I repeat, this is a wise and rational policy.

VII.

Closely related as to what I have just said as to the rationale of the overall apportionment, is the matter of the specific formation of the senatorial districts under Amendment 7. Amendment 7 groups together counties in order to form single member districts, where necessary. It was logical to proceed with the grouping of counties as to senatorial districts because counties in Colorado are, to the people, something more than mere branch offices of the state. The geography of Colorado alone requires it. Colorado, like Alaska, is a huge state. It has fifty-two mountain peaks over 14,000 feet in altitude, while Alaska has but sixteen such peaks. The Colorado Constitution devotes a whole article to County Government; county officers are constitutional officers, not creatures of the legislature; the day by day contact by the citizens with government is their contact with county or city government, not with the state. Legalisms aside, because state government is to them more remote, people in Colorado identify their welfare and their lives with the county, and not with the state. Further, all election procedures are handled by county officers, so that it is not practical or feasible to combine part of one county with another in providing election machinery. So, in forming senatorial districts, the counties were and are the building blocks. From there on the problem has always been to combine counties in forming one district in a manner which will be satisfactory, considering all of the particular factors involved in each case. Witness Rogers has already demonstrated the great amount of experimenting the legislature and the people have done in this regard. A troublesome specific example is the trials and tribulations of Douglas County, which was first combined, and outvoted, by one county or set of counties, then another, and combined with other counties in a geographically impos-

sible district, until finally the present district was formed and some equilibrium established. True, Douglas County has not very much in common with some of the other counties with which it is now combined, but there are some common elements, and the alternatives previously tested or which have since been proposed are worse, much worse.

VIII.

Another factor influencing legislative apportionment is the fact that the General Assembly must meet at the State Capitol in the center of the Denver Metropolitan Area. This is a tremendous practical advantage to the people living in that area. They are able to maintain daily, direct contact with legislation and with the members of the General Assembly. Persons living in more remote areas are unable to have nearly as great an influence on legislation for this reason alone. I have found this to be true both in my experience in the legislature and as Governor. In my opinion this was also a factor in the rationale of Amendment 7.

IX.

Finally, the record will disclose that the people of the State of Colorado have over the years taken a great many things which would otherwise be in the realm of legislative prerogative out of the hands of the General Assembly. Three-fourths of the revenues of the state are earmarked by the Constitution for welfare and road purposes and are not administered by the legislature. This has resulted in the legislature often being referred to as a "two bit" legislature. Moreover, in that great decade of reform from 1900 to 1910 the people took direct and affirmative action to establish and maintain firm control over what remains of legislative action in this state. By the adoption of the Initia-

tive and Referendum Amendments to the Colorado Constitution the ultimate responsibility of apportioning the legislature remains with the people. The authority and the responsibility go together as a team and cannot be separated. Prior to 1910 the General Assembly had the exclusive authority and responsibility to apportion the legislature, but that was completely changed in 1910. This is a tremendously pertinent point in any effort to fix responsibility in this field. Democracy took an important step forward in Colorado in 1910 when this action was taken. Our Colorado Supreme Court has established the fact that the legislature cannot overrule the action of the people in this field. Thus the new legislature remains but the agent of the people who retain the authority to override the action of the legislature or to take original action on any legislative matter, including apportionment. Any action which might be taken by the people would be, of course, by a simple majority vote. Thus, we have in Colorado a structure of government whereby the judicial branch and executive branch are entirely selected by a majority on an equal voter population basis. The third branch of government, the legislative branch, is by Amendment 7 placed upon a strict voter population basis in the House of Representatives and on a basis in the Senate whereby a majority of the voters in Colorado still control, although area factors were definitely considered in the formation of the senate districts and apportionment. Nevertheless the liberal Initiative and Referendum provisions of the Colorado Constitution make it possible for the people, by a straight majority vote on an equal voter population basis, to override or initiate any legislation in any general election, at their will. Thus in the overall scheme of things, the area representation now provided in the Senate by Amendment 7 is not a controlling factor in the setting of future policies of the state. However, it does provide a powerful forum whose voice is

echoed from every hill and valley in this beautiful state.
It provides a just and rational solution of the problem of
apportionment in Colorado.

Further deponent saith not:

/s/ Edwin C. Johnson
Edwin C. Johnson

Subscribed and sworn to before me this..... day of
June, 1963.

My commission expires:

.....
Notary Public

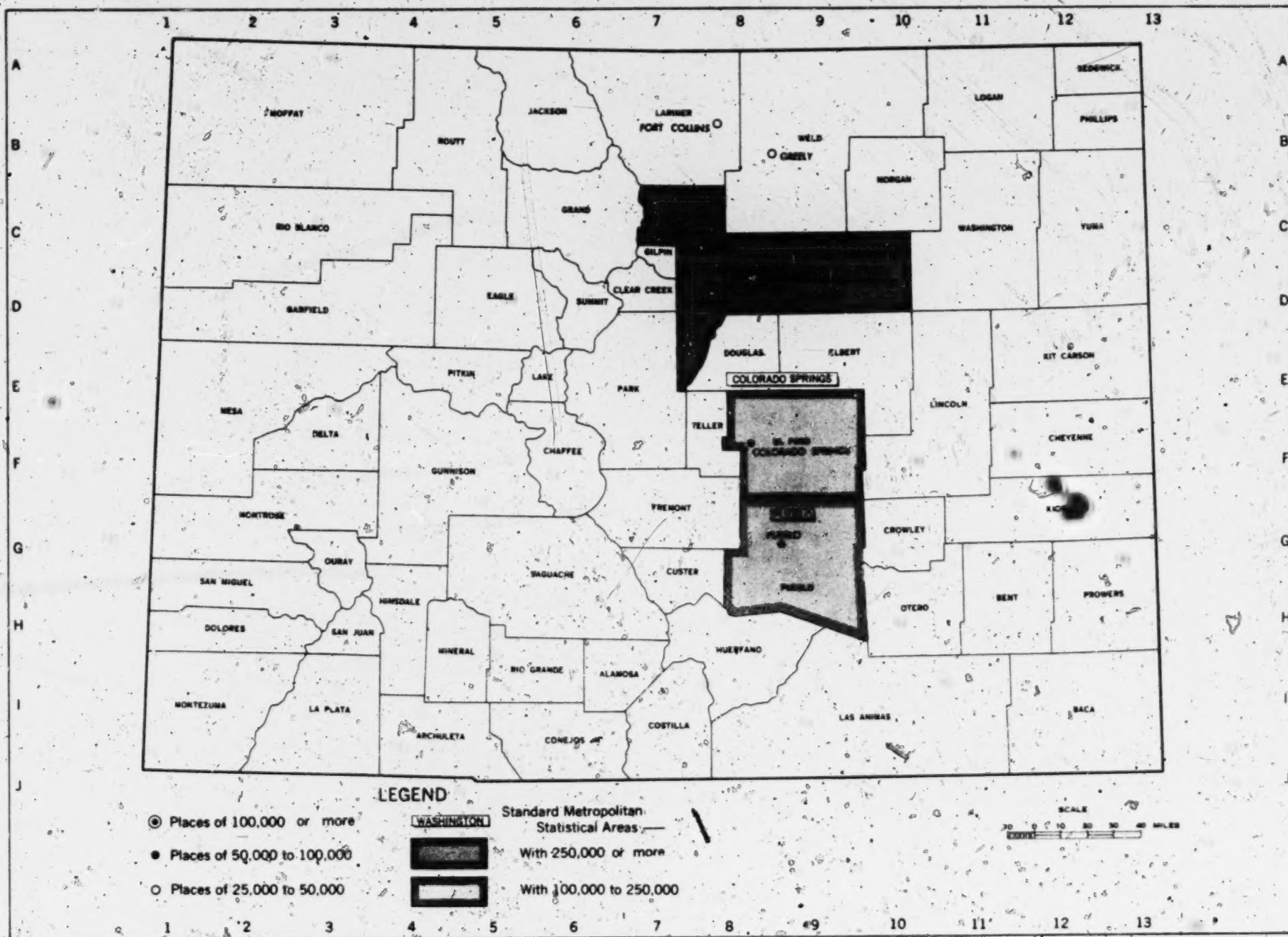
4. PAGE 7-2 (SAME AS PAGE 7-18) OF PLAINTIFFS

EXHIBIT 1

COLORADO — COUNTIES, PLACES OF 25,000 OR MORE, AND STANDARD METROPOLITAN STATISTICAL AREAS

7-2


4. Page 7.2 of Plaintiffs' Exhibit 1



DEFENDANTS' EXHIBITS E, E1, E2,

E3, E4, E5 AND E6

1881 Apportionment—Senatorial Districts

Key: A solid black line () enclosing a county or counties denotes a senatorial district. Additional overlapping districts are identified by crossed lines or by dots.

Thus: 1. Arapahoe County constituted a district.

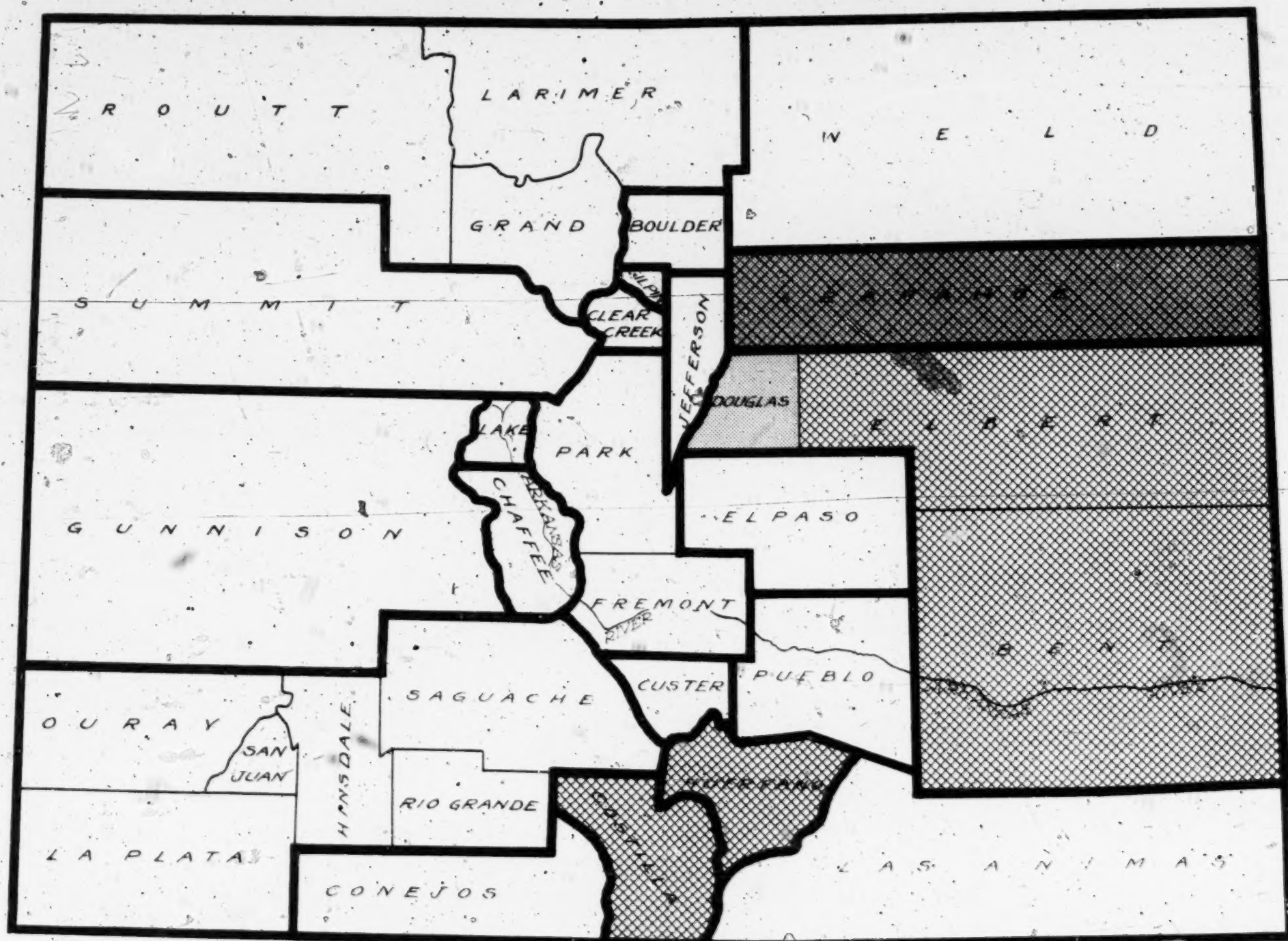
2. Arapahoe and Douglas Counties constituted an overlapping district.

3. Arapahoe, Elbert and Bent Counties constituted an overlapping district.


4. Huerfano and Costilla Counties constituted a district. (The map incorrectly shows Huerfano and Costilla Counties as separate districts.)

Each regular and each overlapping district was entitled to elect one senator except for Arapahoe County which elected four senators and Lake County which elected three senators.

COLORADO SENATE - 1881 APPORTIONMENT



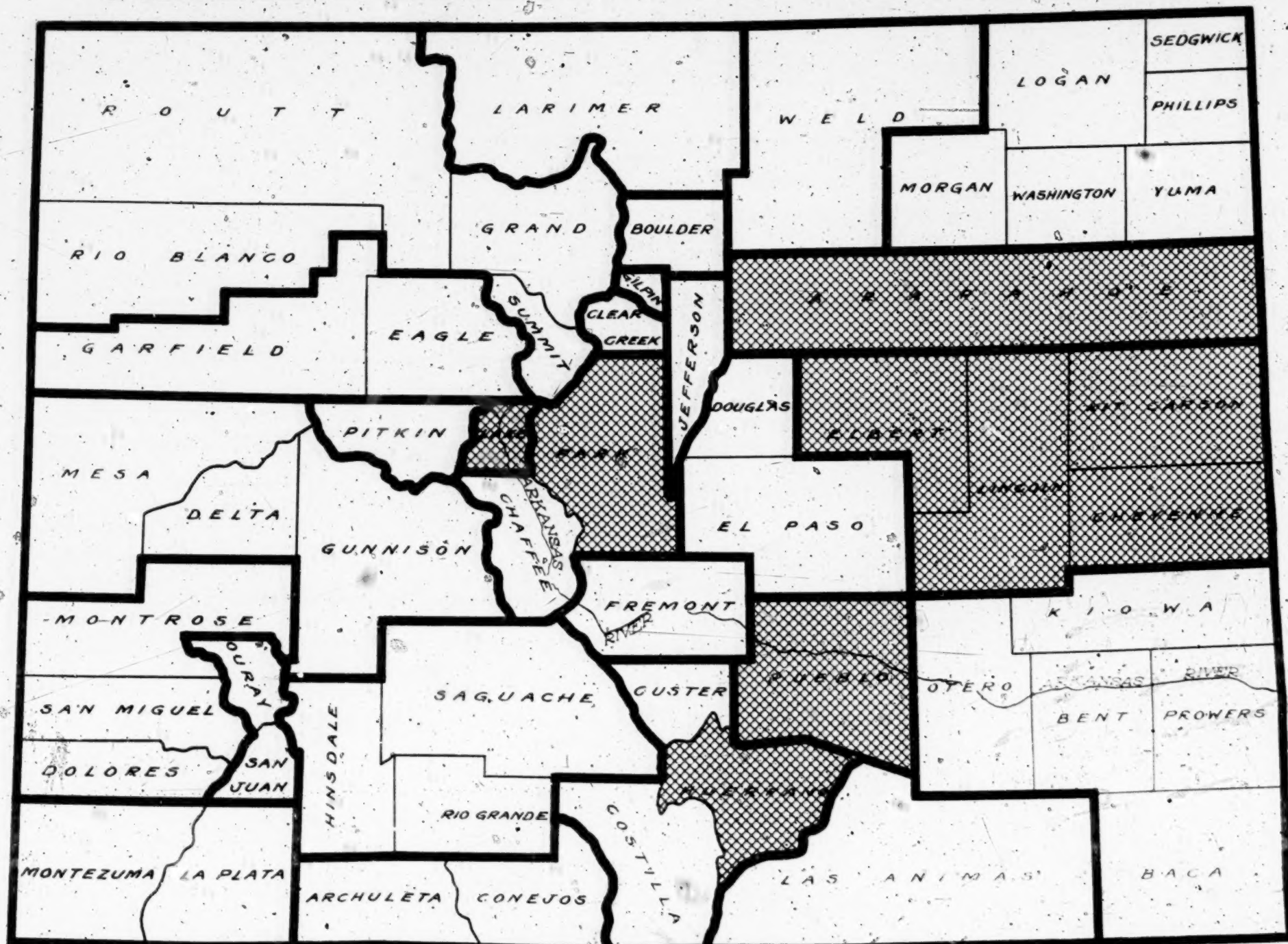
1891 Apportionment—Senatorial Districts

Key: A solid black line () enclosing a county or counties denotes a senatorial district. Additional overlapping districts are identified by crossed lines.

- Thus:
1. Lake County constituted a district;
 2. Lake and Park Counties constituted an overlapping district;
 3. Arapahoe County constituted a district;
 4. Arapahoe, Cheyenne, Kit Carson, Lincoln and Elbert Counties constituted an overlapping district;
 5. Pueblo County constituted a district; and
 6. Pueblo and Huerfano constituted an overlapping district.

Each regular and each overlapping district was entitled to elect one senator, except for Arapahoe County which elected six senators, Pueblo County which elected two senators and Douglas and El Paso Counties which together elected two senators.

COLORADO SENATE - 1891 APPORTIONMENT



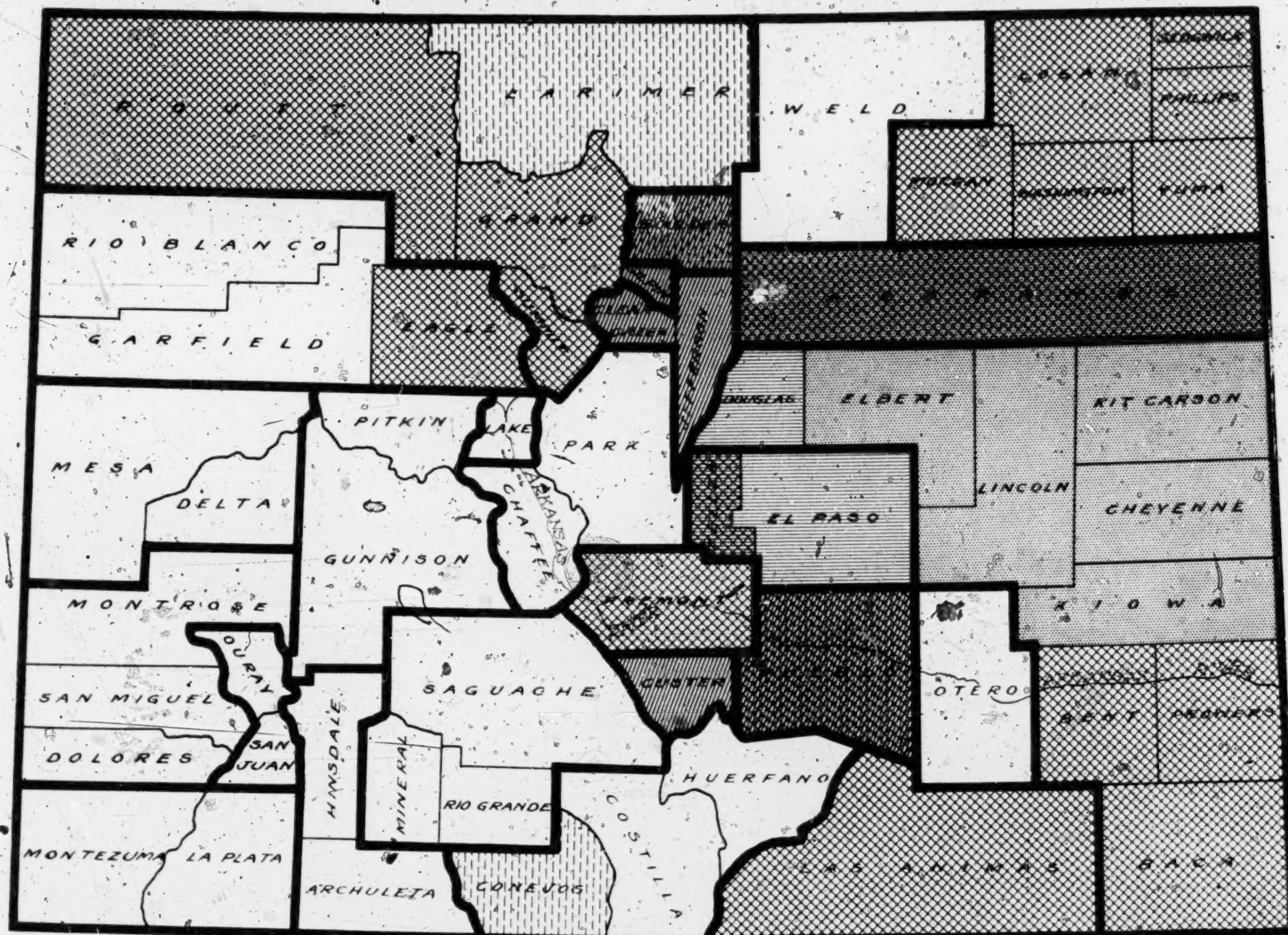
1901 Apportionment—Senatorial Districts

Key: A solid black line (——) enclosing a county or counties denotes a senatorial district. Additional overlapping districts are identified by crossed lines, vertical broken lines, dots, horizontal lines and slanting lines.

- Thus:**
1. Arapahoe County constituted a district.
 2. Arapahoe, Elbert, Lincoln, Kit Carson, Cheyenne and Kiowa Counties constituted an overlapping district.
 3. Arapahoe, Morgan, Washington, Yuma, Phillips, Logan and Sedgwick Counties constituted an overlapping district.
 4. Teller, Douglas, and El Paso Counties constituted an overlapping district.
 5. Pueblo County constituted a district.
 6. Pueblo and Custer Counties constituted an overlapping district.
 7. Pueblo, Fremont and Teller Counties constituted an overlapping district.
 8. Boulder County constituted a district.
 9. Boulder and Larimer Counties constituted an overlapping district.
 10. Boulder, Gilpin, Jefferson and Clear Creek Counties constituted an overlapping district.
 11. Conejos County constituted an overlapping district.
 12. Las Animas County constituted a district.
 13. Las Animas, Bent, Prowers and Baca Counties constituted an overlapping district.
 14. Routt, Eagle, Grand and Summit Counties constituted an overlapping district.

Each regular and each overlapping district was entitled to elect one senator, except for Arapahoe County which elected six senators and El Paso and Teller Counties which together elected two senators.

COLORADO SENATE - 1901 APPORTIONMENT



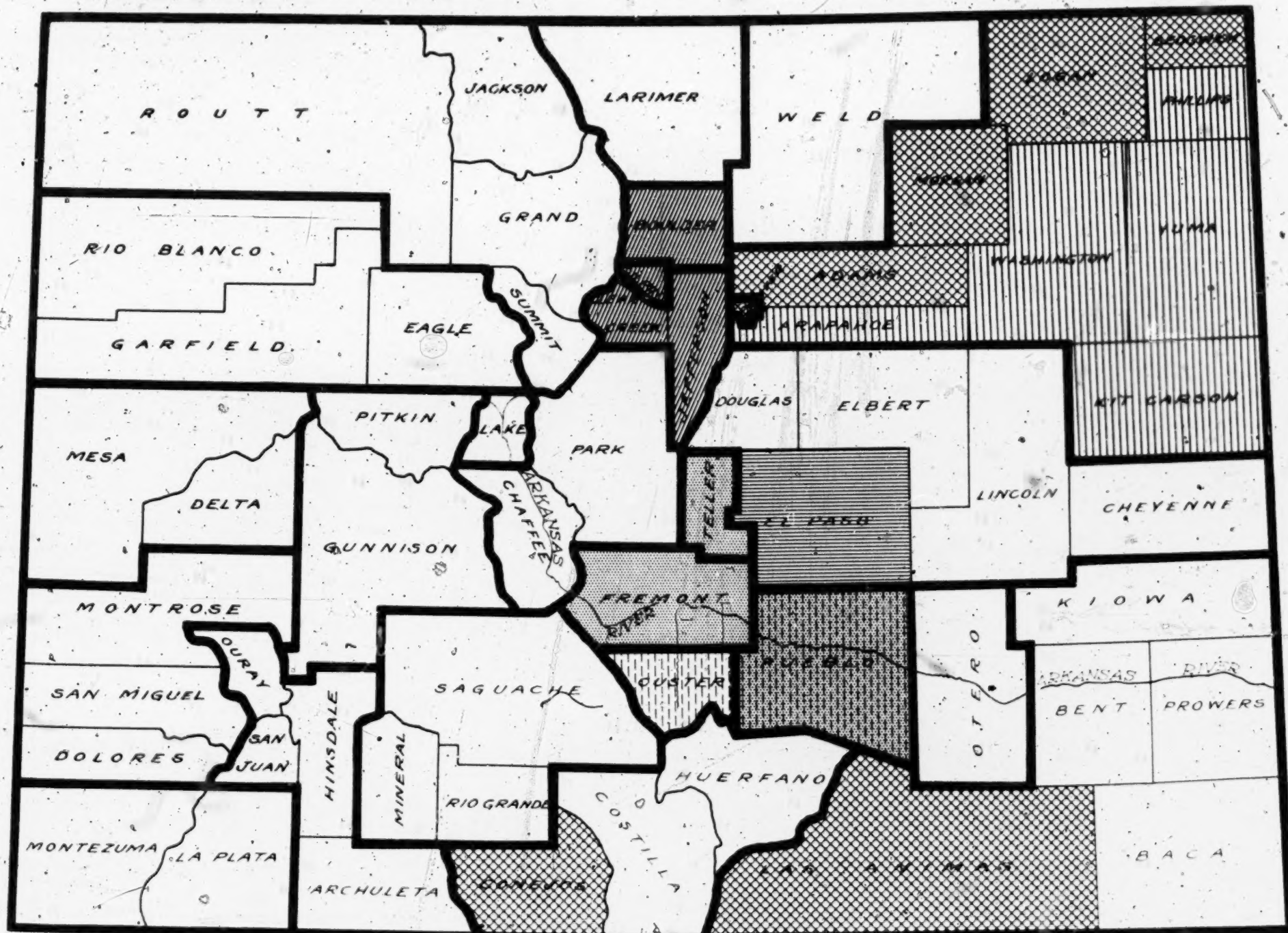
1909 Apportionment—Senatorial Districts

Key: A solid black line (—) enclosing a county or counties denotes a senatorial district. Additional overlapping districts are identified by crossed lines, dots, broken vertical lines, vertical lines and slanting lines.

- Thus:
1. Denver County constituted a district;
 2. Denver, Adams, Morgan, Logan and Sedgwick Counties constituted an overlapping district;
 3. Denver, Arapahoe, Washington, Kit Carson, Yuma and Phillips Counties constituted an overlapping district;
 4. Boulder, Gilpin, Clear Creek and Jefferson Counties constituted an overlapping district;
 5. Pueblo, Fremont and Teller Counties constituted an overlapping district;
 6. Pueblo and Custer Counties constituted an overlapping district;
 7. Conejos County constituted an overlapping district;
 8. Las Animas County constituted an overlapping district; and
 9. El Paso County constituted an overlapping district.

Each regular and each overlapping district was entitled to elect one senator excepting the City and County of Denver, which was entitled to elect six senators.

COLORADO SENATE - 1909 APPORTIONMENT

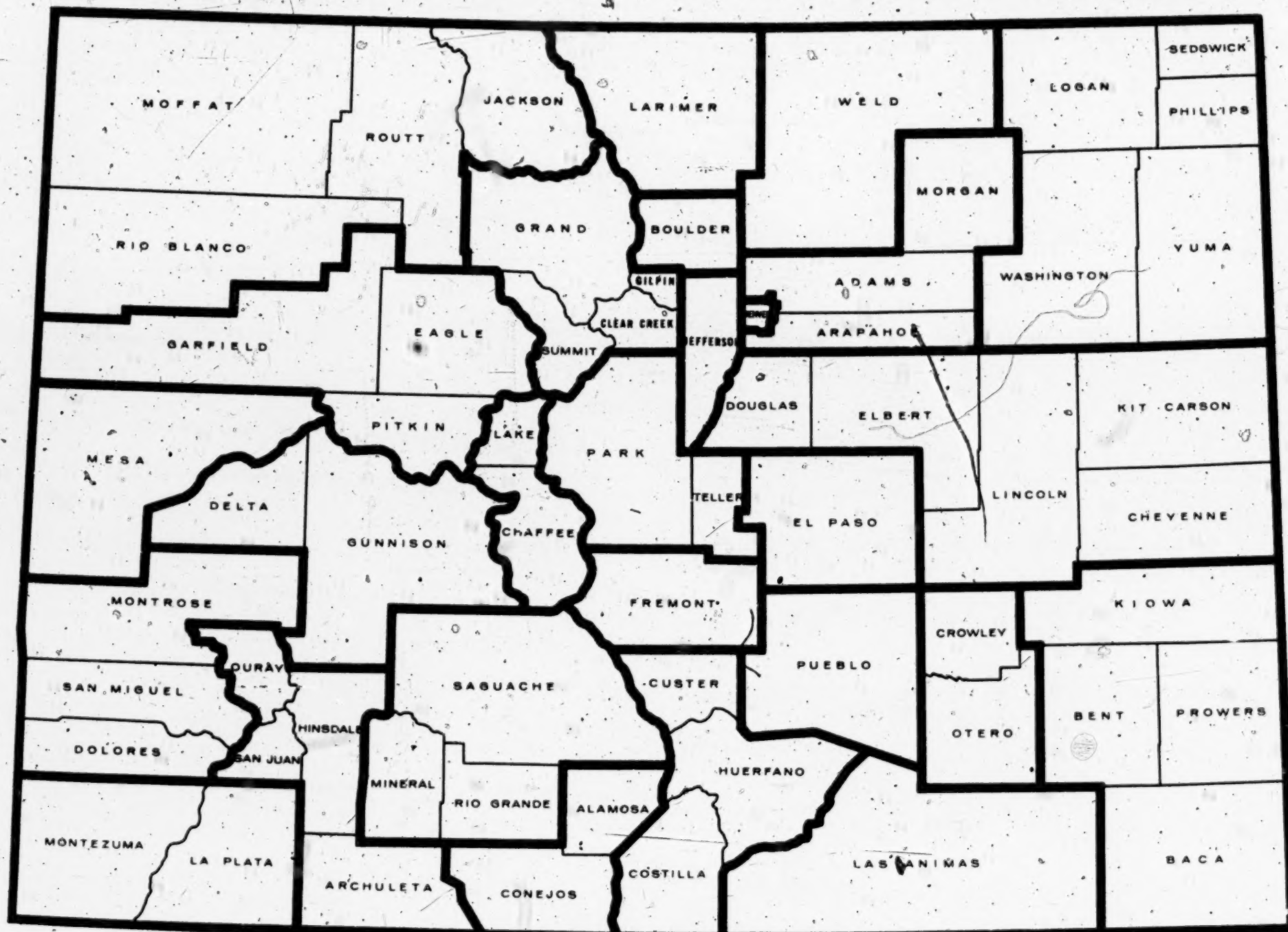


1913 Apportionment—Senatorial Districts

Key: Each senatorial district is enclosed within a heavy black line (———).

Each senatorial district was entitled to elect one senator except for the City and County of Denver which elected seven senators and the Counties of Pueblo and El Paso, each of which elected two senators.

COLORADO SENATE - 1913 APPORTIONMENT

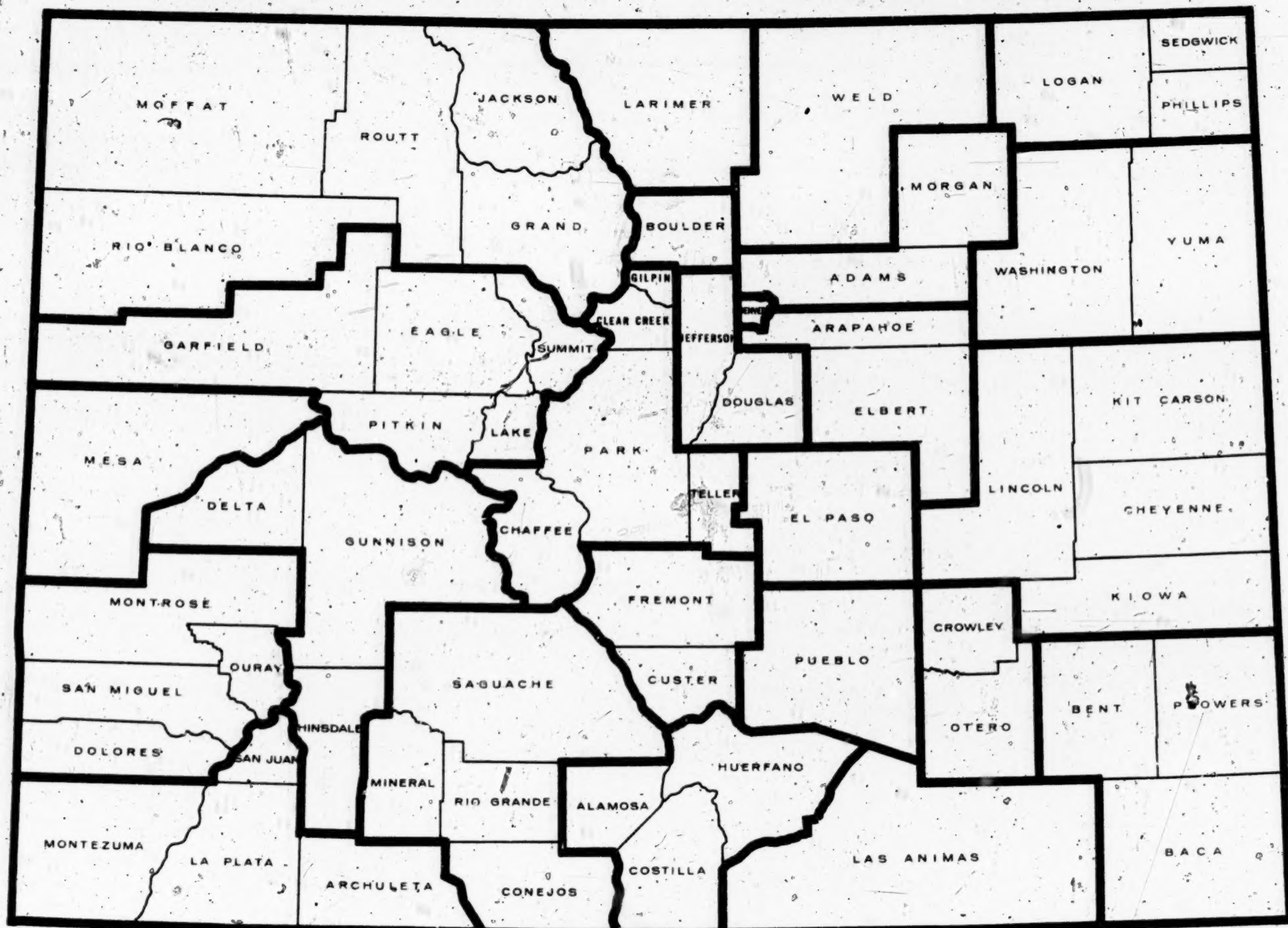


1932 Apportionment—Senatorial Districts

Key: Each senatorial district is enclosed within a heavy black line (**_____**).

Each senatorial district was entitled to elect one senator except for the City and County of Denver which elected eight senators and the Counties of Pueblo and El Paso and Weld, each of which elected two senators.

COLORADO SENATE - 1932 APPORTIONMENT

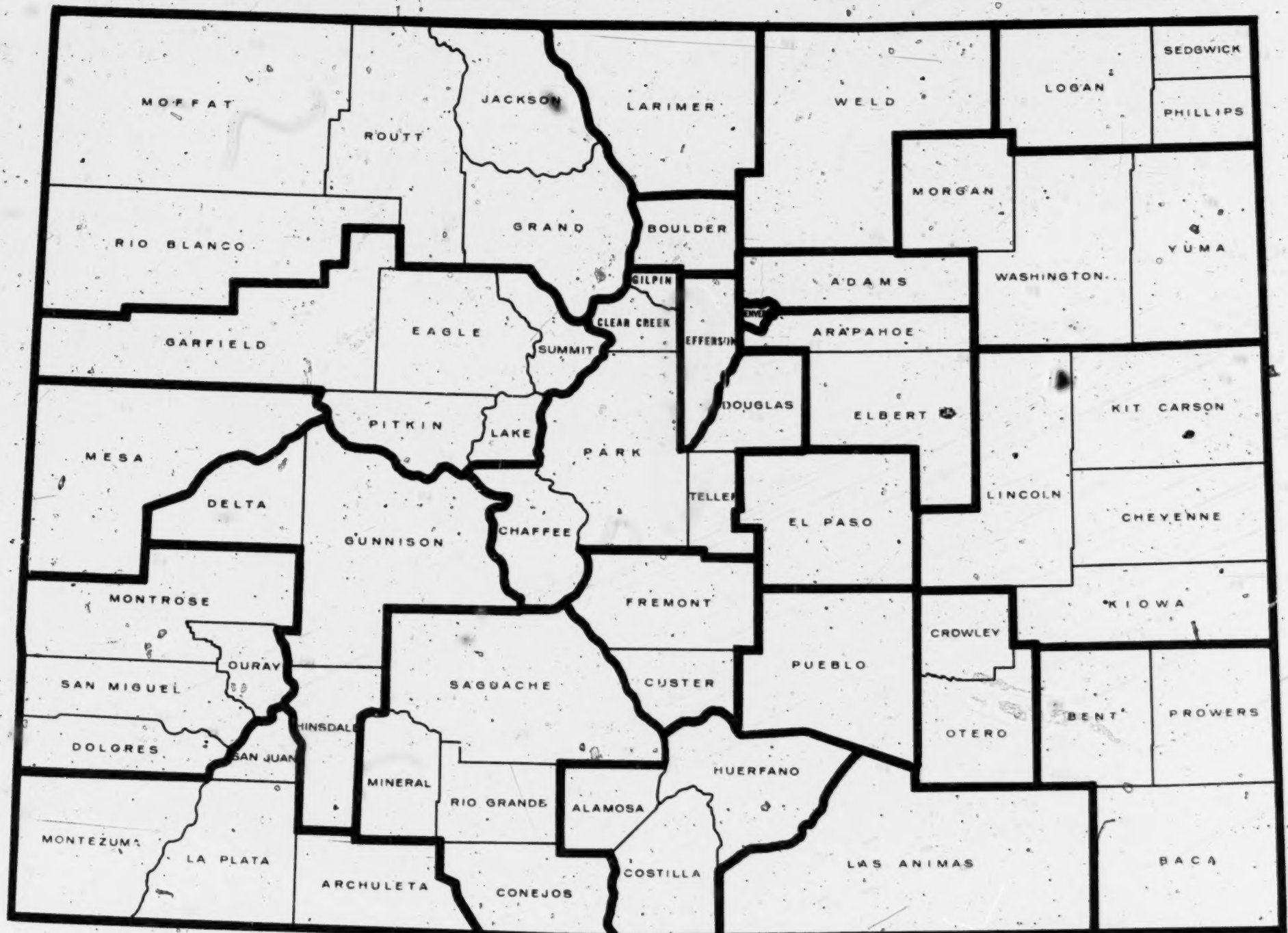


1953 Apportionment—Senatorial Districts

Key: Each senatorial district is enclosed within a heavy black line ().

Each senatorial district was entitled to elect one senator except for the City and County of Denver which elected eight senators and the Counties of Pueblo, El Paso and Weld, each of which elected two senators.

COLORADO SENATE - 1953 APPORTIONMENT



6. INTERVENORS' EXHIBITS

INTERVENORS' EXHIBIT B. REAPPORTIONMENT OF THE SENATE AS ENACTED BY AMENDMENT #7

District	Counties	Square Miles	Population	Sen- ators	Population per Senator
1st	Denver	73	493,887	8	61,736
2nd	Pueblo	2,414	118,707	2	59,353
3rd	El Paso	2,159	143,742	2	71,871
4th	Las Animas	4,798	19,983	1	19,983
5th	Boulder	758	74,254	2	37,127
6th	Chaffee	1,040	8,298	1	20,909
	Park	2,178	1,822		
	Gilpin	149	685		
	Clear Creek	395	2,793		
	Douglas	833	4,816		
	Teller	555	2,495		
7th	Weld	4,033	72,344	2	36,172
8th	Jefferson	791	127,520	2	63,760
9th	Fremont	1,562	20,196	1	21,501
	Custer	738	1,305		
10th	Larimer	2,640	53,343	1	53,343
11th	Delta	1,161	15,602	1	21,287
	Gunnison	3,243	5,477		
	Hinsdale	1,062	208		
12th	Logan	1,849	20,302	1	28,984
	Sedgwick	554	4,242		
	Phillips	680	4,440		
13th	Rio Blanco	3,264	5,150	1	23,426
	Moffat	4,761	7,061		
	Routt	2,331	5,900		
	Jackson	1,628	1,758		
	Grand	1,869	3,557		
14th	Huerfano	1,580	7,867	1	22,086
	Costilla	1,220	4,219		
	Alamosa	723	10,000		
15th	Saguache	3,146	4,473	1	24,485
	Mineral	923	424		
	Rio Grande	916	11,160		
	Conejos	1,274	8,428		
16th	Mesa	3,334	50,715	1	50,715
17th	Montrose	2,240	18,286	1	25,027
	Ouray	540	1,601		
	San Miguel	1,284	2,944		
	Dolores	1,029	2,196		

INTERVENORS' EXHIBIT B (Continued)
REAPPORTIONMENT OF THE SENATE AS ENACTED
BY AMENDMENT #7

<u>District</u>	<u>Counties</u>	<u>Square Miles</u>	<u>Population</u>	<u>Sen- ators</u>	<u>Population per Senator</u>
18th	Kit Carson	2,171	6,957	1	21,189
	Cheyenne	1,772	2,789		
	Lincoln	2,593	5,310		
	Kiowa	1,794	2,425		
	Elbert	1,864	3,708		
19th	San Juan	392	849	1	36,727
	Montezuma	2,097	14,024		
	La Plata	1,691	19,225		
	Archuleta	1,364	2,629		
20th	Yuma	2,383	8,912	1	36,729
	Washington	2,530	6,625		
	Morgan	1,300	21,192		
21st	Garfield	3,000	12,017	1	28,249
	Summit	616	2,073		
	Eagle	1,636	4,677		
	Lake	384	7,101		
	Pitkin	975	2,381		
22nd	Arapahoe	815	113,426	2	56,713
23rd	Otero	1,276	24,128	1	28,106
	Crowley	812	3,978		
24th	Adams	1,250	120,296	2	60,148
25th	Bent	1,543	7,419	1	27,025
	Prowers	1,636	13,296		
	Baca	2,565	6,310		
		104,247	1,753,947	39	

EXHIBIT C

**VOTING RESULTS ON AMENDMENTS 7 AND 8
AS REPORTED BY THE OFFICE OF THE
SECRETARY OF THE STATE OF COLORADO
ON DECEMBER 7, 1962**

**(#7 PASSED IN EACH COUNTY AND
#8 DEFEATED IN EACH COUNTY)**

COUNTY	AMENDMENT 7		AMENDMENT 8	
	For	Against	For	Against
Adams	14,740	10,771	11,277	13,843
Alamosa	1,524	1,015	454	2,024
Arapahoe	18,193	12,351	13,576	16,446
Archuleta	513	141	186	541
Baca	1,507	382	146	1,628
Bent	1,973	378	135	1,990
Boulder	12,654	9,636	8,524	13,311
Chaffee	1,905	747	388	2,065
Cheyenne	1,054	128	85	1,050
Clear Creek	807	392	278	860
Conejos	1,916	365	262	1,737
Costilla	431	173	159	355
Crowley	1,027	234	140	1,057
Custer	584	80	48	582
Delta	4,559	932	443	4,794
Denver	75,877	61,183	55,499	76,208
Dolores	379	137	58	438

EXHIBIT C (Continued)

COUNTY	AMENDMENT 7		AMENDMENT 8	
	For	Against	For	Against
Douglas	1,334	442	304	1,375
Eagle	1,162	357	220	1,231
Elbert	1,360	243	120	1,378
El Paso	17,480	11,509	9,175	19,058
Fremont	5,147	1,476	731	5,564
Garfield	3,410	714	333	3,521
Gilpin	356	100	88	332
Grand	1,087	218	156	1,076
Gunnison	1,365	401	255	1,455
Hinsdale	114	26	18	107
Huerfano	1,667	582	380	1,633
Jackson	616	87	44	615
Jefferson	24,815	17,597	20,229	21,217
Kiowa	955	220	94	1,049
Kit Carson	2,171	367	218	2,220
Lake	1,389	505	438	1,436
La Plata	3,927	1,723	1,345	4,014
Larimer	10,729	4,251	3,530	10,804
Las Animas	3,947	1,278	767	3,742
Lincoln	1,709	312	160	1,792
Logan	4,934	977	576	5,147
Mesa	12,216	3,302	2,509	12,522
Mineral	117	87	28	169

EXHIBIT C (Continued)

COUNTY	AMENDMENT 7		AMENDMENT 8	
	For	Against	For	Against
Moffat	2,060	406	252	2,129
Montezuma	2,408	610	433	2,475
Montrose	4,135	591	347	4,594
Morgan	4,242	1,490	750	4,754
Otero	4,862	1,826	941	5,424
Ouray	562	106	65	575
Park	626	162	87	635
Phillips	1,679	292	138	1,743
Pitkin	576	240	216	471
Prowers	3,090	1,043	536	3,427
Pueblo	14,591	11,555	7,930	17,820
Rio Blanco	1,427	311	221	1,452
Rio Grande	2,089	706	336	2,333
Routt	1,774	455	251	1,878
Saguache	1,035	310	151	1,066
San Juan	280	51	36	273
San Miguel	551	183	105	590
Sedgwick	1,454	145	117	1,378
Summit	406	129	95	417
Teller	599	307	164	701
Washington	1,792	430	149	1,988
Weld	10,914	5,017	2,871	12,217
Yuma	2,898	541	255	3,022
	305,700	172,725	149,822	311,749

INTERVENORS' EXHIBIT D

Percentage of Registered Voters to Total Population
(by County)

<u>County</u>	<u>No. Reg. Voters</u>	<u>Total Pop.</u>	<u>Percent</u>
Adams	51,204	120,296	42.5650
Alamosa	3,923	10,000	39.2300
Arapahoe	54,379	113,426	47.9422
Archuleta	1,393	2,629	52.9859
Baca	3,235	6,310	51.2678
Bent	3,572	7,419	48.1466
Boulder	39,699	74,254	53.4638
Chaffee	4,684	8,298	56.4474
Cheyenne	1,616	2,789	57.9419
Clear Creek	2,025	2,793	72.5027
Conejos	4,494	8,428	53.3222
Costilla	2,515	4,219	59.6112
Crowley	2,209	3,978	55.5304
Custer	963	1,305	73.7931
Delta	8,866	15,602	56.8260
Denver	259,039	493,887	52.2261
Dolores	1,037	2,196	47.2222
Douglas	2,871	4,816	59.6137
Eagle	2,451	4,677	52.4053
Elbert	2,320	3,708	62.5674
El Paso	56,501	143,742	39.3073
Fremont	10,764	20,196	53.2976
Garfield	6,544	12,017	54.4562
Gilpin	720	685	105.1094
Grand	2,128	3,557	59.8257
Gunnison	2,922	5,477	51.5063
Hinsdale	280	208	133.6538
Huerfano	4,902	7,867	62.3109
Jackson	1,065	1,758	60.5802
Jefferson	74,840	127,520	58.6888
Kiowa	1,684	2,425	69.4433
Kit Carson	3,863	6,957	55.5268

INTERVENORS' EXHIBIT D (Continued)

County	No. Reg. Voters	Total Pop.	Percent
Lake	3,526	7,101	49.6549
La Plata	9,992	19,225	51.9739
Larimer	27,246	53,343	51.0769
Las Animas	11,654	19,983	58.3195
Lincoln	3,026	5,310	56.9868
Logan	9,450	20,302	46.5471
Mesa	25,044	50,715	49.3818
Mineral	354	424	83.4906
Moffat	3,648	7,061	51.6647
Montezuma	5,874	14,024	41.8853
Montrose	8,052	18,286	43.4922
Morgan	9,451	21,192	44.5970
Otero	12,126	24,128	50.2569
Ouray	1,135	1,601	70.8932
Park	1,344	1,822	73.7650
Phillips	2,717	4,440	61.1937
Pitkin	1,493	2,381	62.7043
Prowers	6,802	13,296	51.1657
Pueblo	55,185	118,707	46.4875
Rio Blanco	2,661	5,150	51.6699
Rio Grande	5,111	11,160	45.7966
Routt	3,675	5,900	62.2881
Saguache	2,253	4,473	50.5947
San Juan	587	849	69.1402
San Miguel	1,288	2,944	43.7500
Sedgwick	2,316	4,242	54.5968
Summit	1,169	2,073	56.3912
Teller	1,690	2,495	67.7310
Washington	3,452	6,625	52.1057
Weld	32,897	72,344	45.4730
Yuma	5,150	8,912	57.7872
	879,075	1,753,947	50.1

INTERVENORS' EXHIBIT E
COLORADO HOME RULE CITIES AND THEIR
POPULATIONS

Alamosa	6,205.
Arvada	19,242*
Aurora	48,548*
Boulder	37,718*
Canon City	8,973
Colorado Springs	70,194*
Cortez	6,764
Craig	3,984
Delta	3,832
Denver	493,887*
Durango	10,530
Englewood	33,398*
Fort Collins	25,027
Fort Morgan	7,379
Grand Junction	18,694
Greeley	26,314
Lafayette	2,612
Littleton	13,670*
Longmont	11,489
Monte Vista	3,385
Montrose	5,044
Pueblo	91,181*
Sterling	10,751
Westminster	13,850
Wray	2,082
	<hr/>
	974,753

* Population of Home Rule Cities in
"Metropolitan Areas"

807,838

**7. MAJORITY OPINION OF UNITED STATES
DISTRICT COURT**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

ARCHIE L. LISCO, and all other registered voters
of the Denver Metropolitan Area, State of Colo-
rado, similarly situated,

Plaintiffs,

v.

JOHN LOVE, as Governor of the State of Colo-
rado, HOMER BEDFORD, as Treasurer of the
State of Colorado, Byron Anderson, as Sec-
retary of the State of Colorado, THE STATE
OF COLORADO and THE FORTY-FOURTH GEN-
ERAL ASSEMBLY THEREOF,

Defendants.

Civil Action

No. 7501

WILLIAM E. MYRICK, JOHN CHRISTENSEN, ED
SCOTT, GORDON TAYLOR, HENRY ALLARD,
ANDRES LUCAS, JOHN L. KANE, WILLIAM J.
WELLS, FRANK A. CARLSON, WILLIAM EPPIN-
GER, ALLEN L. WILLIAMS, RUTH S. STOCKTON,
KENNETH FENWICK, CHESTER HOSKINSON,
and JOE B. LEWIS, individually and as citizens
of the State of Colorado, residents in the Coun-
ties of Adams, Arapahoe, and Jefferson, and
taxpayers and voters in the State of Colorado,
for themselves and for all other persons simi-
larly situated,

Plaintiffs,

Civil Action

No. 7637

THE FORTY-FOURTH GENERAL ASSEMBLY of
the State of Colorado, JOHN LOVE, as Gov-
ernor of the State of Colorado, HOMER BEDFORD,
as Treasurer of the State of Colorado, and
BYRON ANDERSON, as Secretary of State of
the State of Colorado,

Defendants.

EDWIN C. JOHNSON, JOHN C. VIVIAN,
JOSEPH F. LITTLE, WARWICK DOWNING, and
WILBER M. ALTER, individually and as citizens,
residents and taxpayers of the State of Colo-
rado, on behalf of themselves and for all per-
sons similarly situated,

Civil Actions
No. 7501 and
No. 7637

Intervenors.

Francis R. Salazar and Carl Harthun, Attorneys at Law, 304 Denver-U. S. National Center, 1700 Broadway, Denver 2, Colorado, for Plaintiffs in Civil Action No. 7501.

George Louis Creamer and Charles Ginsberg, Attorneys at Law, 928 Equitable Building, Denver 2, Colorado, for Plaintiffs in Civil Action No. 7637.

Duke W. Dunbar, Attorney General for the State of Colorado, and Richard W. Bangert, Assistant Attorney General for the State of Colorado, 104 State Capitol, Denver 2, Colorado; Anthony F. Zarlengo and V. G. Seavy, Jr., Attorneys at Law, 830 Majestic Building, Denver 2, Colorado, for Defendants in Civil Actions No. 7501 and No. 7637.

Richard S. Kitchen, Charles S. Vigil and Harvey Williams, Attorneys at Law, 2155 First National Bank Building, Denver 2, Colorado, for Intervenors in Civil Actions No. 7501 and No. 7637.

Philip J. Carosell, Attorney at Law, 430 Majestic Building, Denver 2, Colorado, Amicus Curiae in Civil Actions No. 7501 and No. 7637.

MEMORANDUM OPINION AND ORDER

Before BREITENSTEIN, Circuit Judge, and ARRAJ and DOYLE, District Judges.

BREITENSTEIN, Circuit Judge.

These consolidated actions attack the apportionment of the membership of the bicameral Colorado legislature. At the 1962 General Election, two initiated constitutional amendments were submitted to the electorate. One, known as Amendment No. 7, provided for a House of Representatives with the membership apportioned on a per capita basis and for a Senate which was not so apportioned. The other, Amendment No. 8, apportioned both chambers on a per capita basis. Amendment No. 7 carried in every county of the state and Amendment No. 8 lost in every county.¹ The contest over the conflicting theories presented by these two proposals has not shifted from the political arena to the court. The issue is whether the Federal Constitution requires that each house of a bicameral state legislature be apportioned on a per capita basis.

The plaintiffs are residents, taxpayers, and qualified voters within the Denver Metropolitan Area. The defendants are various state officials² and the Colorado General Assembly. The complaints as originally filed on March 28 and July 9, 1962, respectively, challenged the apportionment of legislative membership under the then existing constitutional and statutory provisions. Because the suits presented substantial questions as to the constitutionality of state statutes and sought injunctive relief, a three-judge court was convened under 28 U.S.C. § 2281. The proponents of Amendment No. 7, which had then been submitted to the Colorado Secretary of State for inclusion on the ballot at the 1962 General Election, were permitted to intervene.³

¹See footnote 32, *infra*.

²Since the suits were filed, the incumbents of these offices have changed. An appropriate order of substitution has heretofore been made under Rule 25(d), F.R.Civ.P.

³Four of the intervenors are residents, taxpayers, and qualified voters of the counties within the Denver Metropolitan Area and the other of Moffat County. One intervenor was a non-profit corporation and it has been heretofore dismissed from the case on the ground of a lack of capacity to sue.

On August 10, 1962, after trial, the court held⁴ that it had jurisdiction, that the plaintiffs had capacity to sue, that the evidence established disparities in apportionment "of sufficient magnitude to make out a *prima facie* case of invidious discrimination," and that the defendants had shown no rational basis for the disparities. The court noted that the aforementioned initiated constitutional amendments would be on the ballot at the ensuing General Election, declined to enjoin the forthcoming primary election and to devise a plan of apportionment, and continued the cases until after the General Election.

Following the approval by the electorate of Amendment No. 7, the plaintiffs amended their complaints to assert that Amendment No. 7 violates the Fourteenth Amendment to the United States Constitution by apportioning the Senate on a basis other than population and that, as the provisions of Amendment No. 7 are not severable, the entire amendment is invalid. In answering the amended complaints, the defendants renewed their jurisdictional objections and asserted the constitutionality of Amendment No. 7.

We are convinced that the allegations of the complaints are sufficient to establish federal jurisdiction under 28 U.S.C. §1343 and 42 U.S.C. §1983, and that the plaintiffs have standing to sue.⁵ The relief sought is a declaration that Amendment No. 7 is void, that the theretofore existing statutory apportionment is void, and that the court fashion appropriate injunctive relief to assure equality in voting rights. Although the prime attack is now against a provision of the state constitution rather than a state statute, the necessity of adjudication by a three-judge district court is still present.⁶

⁴See *Lisco v. McNichols*, D.C.Colo., 208 F.Supp. 471, 478.

⁵*Baker v. Carr*, 369 U.S. 186, 204-208.

⁶See *American Federation of Labor v. Watson*, Attorney General, 327 U.S. 582, 592-593, and *Sincock v. Duffy*, D.C.Del., 215 F.Supp. 169, 171-172.

The Colorado legislature met in January, 1963, and passed a statute, H. B. No. 65, implementing Amendment No. 7. No question is raised concerning the implementing legislation.

Amendment No. 7¹ created a General Assembly composed of a Senate of 39 members and a House of Representatives of 65 members. The state is divided into 65 representative districts "which shall be as nearly equal in population as may be" with one representative to be elected from each district. The state is also divided into 39 senatorial districts, 14 of which include more than one county. In counties apportioned more than one senator, senatorial districts are provided which "shall be as nearly equal in population as may be." Mandatory provisions require the revision of representative districts and of senatorial districts within counties apportioned more than one senator after each Federal Census.

The defeated Amendment No. 8² proposed a three-man commission to apportion the legislature periodically. The commission was to have the duty of delineating, revising and adjusting senatorial and representative districts. Its actions were to be reviewed by the Colorado Supreme Court. The districting was to be on a strict population ratio for both the Senate and the House with limited permissible variations therefrom.

The record presents no dispute over the material and pertinent facts. The parties disagree as to the conclusions to be drawn from these facts. The plaintiffs rely entirely on statistics said to show that population disparities among the senatorial districts result in over-representation of rural areas. The defendants and intervenors assert that the senatorial districts, and the apportionment of senators thereto, have a rational basis and violate no provisions of the Federal Constitution.

¹See Appendix A following this opinion.

²See Appendix B following this opinion.

The prime position of the plaintiffs is that representation in proportion to population is the fundamental standard commanded by the Federal Constitution. They say that this standard requires that each house must be made up of members representing substantially the same number of people.

The principle of equal weight for each vote is satisfied by a system under which all members of the legislature are elected at large. Such system would result in absolute majority rule and would effectively deny representation to minority interests. Although it would assure no dilution of the weight of any individual's vote, it presents the danger of dilution of the representative and deliberative quality of a legislature because of the practical difficulties of intelligent choice by the voters and because of the hazard of one-party domination.

The disadvantages of elections at large are overcome by the principle of districting. This principle provides representation to interests which otherwise would be submerged by the majorities in larger groups of voters.

From the very beginning of our Nation, districting has been used at all levels of government—national, state and local.⁹ The application of the districting principle to a state legislature requires the division of the state into geographical areas and the apportionment of a certain number of members of the legislature to each district. The plaintiffs say that the district boundaries must be so drawn, and the apportionment to each so made, that the result is substantial equality in the number of people represented by each member of each chamber of the legislature. The query is whether this is required by the Federal Constitution.

⁹As said by Neal in his article, "Baker v. Carr: Politics in Search of Law," published in the 1962 Supreme Court Review, 252, 277; " * * * the principle of districting within each such unit reflects our conviction, that the general interest, and the innumerable separate interests of which it is composed, will be better expressed in a medley of voices from minor fractions of the population than by any monolithic majority."

Baker v. Carr sets up no standards for the apportionment of a state legislature. That decision rejects the Guaranty Clause¹⁰ as a basis for judicial action in such cases and speaks in terms of the Equal Protection Clause of the Fourteenth Amendment with overtones of the Due Process Clause. The application of these principles causes us difficulty. If we are concerned with equal protection, the question arises as to what laws we consider when evaluating the equality of protection. In *Baker v. Carr* a non-compliance with state constitutional provisions was present. We have no need to consider whether deliberate departure from state law denies equal protection¹¹ because here we are dealing with the state constitution itself and the attacked provisions fall only if they impinge on the Federal Constitution.

We are not concerned here with racial discriminations forbidden by the Fourteenth and Fifteenth Amendments or with discrimination on the ground of sex in violation of the Nineteenth Amendment. If we reject the republican form of government standard as a basis for judicial action, we are left with the Due Process Clause to support an assertion of denial of equal protection upon the theory that unequal representation denies equal protection because minority process is not due process.¹²

For all practical purposes the Supreme Court has foregone the application of the Due Process Clause in substantive matters unless an impingement on some absolute civil right occurs.¹³ Although the right of franchise is "a fun-

¹⁰U. S. Const. Art. IV, § 4.

¹¹See *Snowden v. Hughes*, 321 U.S. 1, 11.

¹²Dixon, "Legislative Apportionment and the Federal Constitution," *Law and Contemporary Problems*, Vol. XXVII, No. 3, 329, 383.

¹³See *Ferguson, Attorney General of Kansas, v. Skrupa*, 372 U.S. 726, 731, wherein the Court refers to the abandonment of the use of the Due Process Clause "to nullify laws which a majority of the Court believed to be economically unwise."

damental political right, because preservative of all rights,"¹⁴ no provision of the Federal Constitution of which we are aware makes it an absolute right or forbids apportionment of a state legislature on a basis other than one-man, one-vote. *Baker v. Carr* speaks in terms of "rationality" and "invidious discrimination." The use of these terms precludes the existence of an absolute right.

If either the Equal Protection Clause or the Due Process Clause or both require absolute majority action, some drastic governmental changes will be necessary. "Every device that limits the power of a majority is, in effect, a means of giving disproportionate representation to the minority."¹⁵ The problem is compounded in the situation with which we are concerned. With full operation of the one-man, one-vote principle, the Colorado electorate by an overwhelming majority approved a constitutional amendment creating a Senate, the membership of which is not apportioned on a strict population basis. By majority process the voters have said that minority process in the Senate is what they want. A rejection of their choice is a denial of the will of the majority. If the majority becomes dissatisfied with that which it has created, it can make a change at an election in which each vote counts the same as every other vote.

A test for determination of equal protection in appor-

¹⁴*Yick Wo v. Hopkins, Sheriff*, 118 U.S. 356, 370.

¹⁵Quoted from Neal, *supra*, p. 281. Neal says further: "A constitutional principle that puts unequal districting in doubt also calls into question, by necessary implication, provisions requiring special majorities for particular kinds of legislation, such as approval of bond issues in municipal referenda or adoption of proposed constitutional amendments by legislatures or passage of legislation over an executive veto. Why should it not reach, as well, other procedural rules or devices that give obstructive power to minorities, such as the filibuster or the seniority system for choosing committee chairmen?"

tionment cases might logically be better based on the concept of a republican form of government than on the uncertainties, vagueness, and subjective implications of due process. Whichever route is taken the journey ends at the same destination, the necessity of deciding whether the Federal Constitution requires equality of population within representation districts for each house of a bicameral state legislature. We believe that the question must be answered in the negative.

The concept of equality of representation is without historical support.¹⁶ Supreme Court precedents indicate that it is not required.¹⁷ Four, and perhaps five, of the Justices sitting in *Baker v. Carr* reject the idea.¹⁸ A heavy majority of the state and lower federal courts has declined to accept the "practical equality standard" as a require-

¹⁶See the historical material in the dissent of Justice Frankfurter in *Baker v. Carr*, 359 U.S. 186, at 301-324, and the opinion of Judge Edwards in *Scholle v. Hare*, 360 Mich. 1, at 85, 104 N.W.2d 63, at 107, vacated and remanded 369 U.S. 429, on remand 367 Mich. 176, 116 N.W.2d 350, petition for certiorari filed October 15, 1962, 31 Law Week 3147.

¹⁷E.g. *MacDougall v. Green*, Governor of Illinois, 335 U.S. 281, where the Court said: "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government." (p.283) In *Norvell v. State of Illinois*,U.S., decided May 27, 1963, a case relating to the right of an indigent to a trial transcript at state expense, the Court, after quoting from *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70, a statement that the problems of government are practical ones which may justify if not require rough accommodations, said: "The 'rough accommodations' made by government do not violate the Equal Protection Clause of the Fourteenth Amendment unless the lines drawn are 'hostile or invidious.'"

¹⁸See concurring opinion of Justice Clark (359 U.S. 186) at p. 252, concurring opinion of Justice Stewart at pp. 265-266, and separate dissenting opinions of Justices Frankfurter and Harlan. Justice Douglas said in his concurring opinion at pp. 244-245: "Universal equality is not the test; there is room for weighting."

ment inherent in the Equal Protection Clause.¹⁹ By the admission of states into the Union with constitutions creating bicameral legislatures, membership to which is not apportioned on a population basis, Congress has rejected the principle of equal representation as a constitutional requirement.²⁰ The decision in *Gray v. Sanders*, 372 U.S. 368, is not contrary because there the Court was not concerned with any limitation on "the authority of a State Legislature in designing the geographical districts from which representatives are chosen * * * for the State Legislature * * *."²¹ The references in *Gray v. Sanders* to one-

¹⁹*Sobel v. Adams*, S.D.Fla., 208 F.Supp. 316, 321, 323, 214 F.Supp. 811; *Thigpen v. Meyers*, W.D.Wash., 211 F.Supp. 826, 831; *Sims v. Frink*, M.D.Ala., 205 F.Supp. 245, 208 F.Supp. 431, 439, probable jurisdiction noted June 10, 1963, U.S. v. W.M.C.A., Inc., v. Simon, S.D.N.Y., 208 F.Supp. 368, 379, probable jurisdiction noted June 10, 1963, U.S. v. Baker v. Carr, M.D.Tenn., 206 F.Supp. 341, 345; *Mann v. Davis*, E.D.Va., 213 F.Supp. 577, 584, probable jurisdiction noted June 10, 1963, U.S. v. Toombs v. Fortson, N.D.Ga., 205 F.Supp. 248, 257; *Davis v. Synhorst*, S.D.Iowa, F.Supp. 31 Law Week 2587; *Nolan v. Rhodes*, S.D.Ohio, F.Supp. 31 Law Week 2641; *Lund v. Mathas*, 145 So.2d 871, 873 (Fla.); *Caesar v. Williams*, 371 P.2d 241, 247-249 (Idaho); Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656, 667-669, 229 Md. 317, 182 A.2d 877, 229 Md. 406, 184 A.2d 715, 718, probable jurisdiction noted June 10, 1963, U.S. v. Levitt v. Maynard, 182 A.2d 897 (N.H.); *Jackman v. Bodine*, 78 N.J.Super. 414, 188 A.2d 642, 651; *Sweeney v. Notte*, 183 A.2d 296, 301-302 (R.I.); and *Mikell v. Rousseau*, 183 A.2d 817 (Vt.).

See Israel, "The Future of *Baker v. Carr*," 61 Mich. L. Rev. 107, 117, which notes as exceptions to the majority rule only *Scholle v. Hare*, 367 Mich. 176, 116 N.W.2d 350, petition for certiorari filed, 31 Law Week 3147 (Oct. 15, 1962), and *Moss v. Burkhardt*, W.D.Okla., 207 F.Supp. 885, appeal dismissed U.S. June 10, 1963. The inclusion of *Moss v. Burkhardt* as an exception is of doubtful propriety because the court there was concerned with specific provisions of the Oklahoma constitution. *Sincock v. Duffy*, D.Del., 215 F.Supp. 169, presented a question of severability and the peculiar factual situation in Delaware. The majority of the court said that the House must be based strictly on population and the Senate "substantially on population." 215 F.Supp. at 195.

²⁰The constitutions of Alaska and Hawaii do not require equality of representation in each chamber of the legislature. In admitting these states Congress found the constitution of each "to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence." See Act of July 7, 1958, 72 Stat. 339, and Act of March 18, 1959, 73 Stat. 4.

²¹372 U.S. 368, 376, and see concurring opinion of Justice Stewart at pp. 381-382.

person, one-vote are not pertinent because the Court was considering an electoral system whereby votes for officers elected from a state-wide constituency were weighted differently.

Our conclusion that nothing in the Constitution of the United States requires a state legislature to be apportioned on a strict population basis does not dispose of the problem. The issue remains as to the permissible deviation from a per capita basis. Speaking in terms long applicable to equal protection cases, the Court suggested in *Baker v. Carr* that an apportionment of membership in a state legislature must be "rational" and not "invidiously discriminatory." The issue is narrowed in the cases at bar because, under Amendment No. 7, the lower chamber of the Colorado legislature is apportioned on a population basis. The question is the effect of the failure to apportion the upper chamber on the same basis. A discussion of this matter necessitates a return to the facts.

The cases now before the court do not present the issues as they existed prior to the apportionment made by Amendment No. 7. As noted by our opinion in *Lisco v. McNichols*, 208 F.Supp. 471, 477, the then-existing disparities in each chamber were severe, the defendants presented no evidence to sustain the rationality of the apportionment, and witnesses for the intervenors, while defending the apportionment of the Senate, recognized the malapportionment of the House. The change by Amendment No. 7 was such as to require a trial *de novo* and we are concerned with the facts as finally presented.

In Colorado the problem of districting the state for the election of members of the legislature and of apportioning legislators to those districts requires consideration of the state's heterogeneous characteristics. The politically determined boundaries of Colorado created a state which is not an economically or geographically homogeneous unit.

The topography of the state is probably the most significant contributor to the diversity.

Colorado has an area of 104,247 square miles which is almost equally divided between high plains in the east and rugged mountains in the west. It has an average altitude of 6800 feet above sea level and some 1500 peaks which rise to 10,000 feet or more. The Continental Divide crosses the state in a meandering line from north to south.

In the eastern half of the state are high plains, crossed by two major river systems, the South Platte and the Arkansas. The western half is a mountainous area drained principally by the Rio Grande and by the Colorado River and its tributaries. Major mountain ranges lie east of the Continental Divide in some sections of the state and have foothill areas of varying breadth separating the high peaks from the high plains.

Geographically the state is divided into many regions with transportation difficulties of varying severity. The high plains are crossed from east to west by several railroads and main highways. The only north to south rail system and main highway system in this area lie just east of the foothills. The western part of the state is separated into many segments by mountain ranges and deep canyons. One main-line railroad crosses this section from east to west and none from north to south. Four principal highways provide east to west transportation by crossing the ranges at passes having altitudes of 9,000 to 12,000 feet. The north to south highways are less adequate and follow indirect routes. The terrain of the western section is such that some communities only a few miles apart on the map are many miles apart by the shortest useable road. Commercial air transportation between other than the metropolitan centers is limited.

Colorado is further divided by the availability of water supply. The state is largely semi-arid with only isolated

mountain areas having an annual precipitation of over 20 inches. That part of Colorado west of the Continental Divide has 37% of the total state land area and 69% of the state's surface water yield. The part east of the Continental Divide has 63% of the land area and 31% of the surface water supplies.²² Conflicts over the use of water have troubled the state continuously since its admission to the Union. The growth of the metropolitan areas would have been impossible without the transmountain diversion of water from the Colorado River and its tributaries. The divisive nature of the problem and the need for a state-wide water policy resulted in the creation of the Colorado Water Conservation Board,²³ the members of which are chosen geographically by drainage basins. This recognition of the diverse interests of the competing areas has enabled Colorado to develop impressive irrigation and hydroelectric power projects.²⁴

The 1960 Federal Census gave Colorado a population of 1,753,947 persons. The population is concentrated heavily along the eastern edge of the foothills from Fort Collins on the north to Pueblo on the south. In this relatively narrow strip are located three Standard Metropolitan Statistical Areas as defined by the Census Bureau.²⁵

The metropolitan areas and their populations are: Denver (Adams, Arapahoe, Boulder, Denver and Jeffer-

²²Colorado Year Book, 1959-1961, p. 451.

²³Colo. Rev. Stat. Ann., 1953, §§ 148-1-1 to 148-1-19.

²⁴Colorado Year Book, *supra*, pp. 459-462.

²⁵So far as pertinent the Census Bureau defines a Standard Metropolitan Statistical Area as: "a county or group of contiguous counties which contains at least one city of 50,000 inhabitants or more or 'twin cities' with a combined population of at least 50,000. In addition to the county, or counties, containing such a city or cities, contiguous counties are included in an SMSA if, according to certain criteria, they are essentially metropolitan in character and are socially and economically integrated with the central city. The criteria followed in the delineation of SMSA's relate to a city, or cities, of sufficient population size to constitute the central city and to the economic and social relationships with contiguous counties that are metropolitan in character."

son Counties)—929,383; Colorado Springs (El Paso County)—143,742; Pueblo (Pueblo County)—118,707.

Expert research economists testifying for the defendants divided the state into four regions, Western, Eastern, South Central and East Slope. The Western Region includes those counties west of the Continental Divide and those east of the Divide and entirely within the Front Range of mountains. The area is largely mountainous with wide fluctuations in elevation, precipitation and temperature. About two-thirds of the population live in communities of less than 2,500 inhabitants or on farms. Over 65% of the area is in some form of government ownership. The major industries are agriculture (principally livestock raising), mining, and tourism.

The Eastern Region is a part of the Great Plains. The area is dominated by agriculture with winter wheat the principal crop. Irrigation in the South Platte and Arkansas Valleys produces specialized crops. Livestock raising and feeding are important activities. There is some oil production.

The South Central Region includes Huerfano and Las Animas Counties and the six counties drained by the Rio Grande. Agriculture (principally potato raising and livestock) and coal mining are the main industries.

The East Slope Region includes the strip of counties from Larimer and Weld on the north through Pueblo on the south. The population is highly urbanized with 86.7% living in urban areas. The economy is diversified with manufacturing, agricultural production, mining, tourism, and trade and services contributing to the wealth of the area.

The state is divided into 63 counties, the boundaries of which have remained substantially unchanged since 1913. Historically, contiguous counties have been grouped into representation districts in accordance with a general pattern which is distinguishable since the early days of

statehood. Geographical divisions such as mountain ranges and river basins, accessibility, homogeneity, and population all have been recognized. The apportionment of membership to the districts has varied with shifts in population. In the early days of statehood the mining counties were heavily populated. After the turn of the century the increased population of the agricultural counties in the high plains and the decline of the mining counties required changes in apportionment. In more recent years the growth of metropolitan areas has caused a demand for greater representation of the urban centers in the legislature.

Apportionment of the Colorado legislature has not remained static. Legislative revisions occurred in 1881, 1891, 1901, 1909, 1913, and 1953. In 1910, Colorado adopted a liberal constitutional provision for the initiative and referendum of both "laws and amendments to the constitution."²⁶ An initiated reapportionment law was adopted in 1932.²⁷ At its next session the legislature passed its own reapportionment law and the conflict between it and the initiated measure went to the Colorado Supreme Court,²⁸ which upheld the power of the people to adopt the initiated reapportionment measure, sustained the validity of the initiated reapportionment, and declared the legislative act unconstitutional. In 1954 the voters rejected a referred apportionment measure and in 1956 rejected an initiated constitutional amendment proposing the reapportionment of both chambers of the legislature on a straight population basis.²⁹

²⁶Colo. Const. Art. V, § 1. A constitutional amendment may be initiated by petition of 8% of the legal voters. No geographical distribution of petition signers is required.

²⁷Colo. S. L. 1933, Ch. 157, p. 811.

²⁸*Armstrong v. Mitten*, 95 Colo. 425, 37 P.2d 757.

²⁹The vote in 1954 was 159,188 against and 116,695 for. The proposal lost in every county. The vote in 1956 was 349,195 against and 158,204 for. The proposal lost in every county except Denver.

After the defeat of the 1956 proposal the Governor appointed a commission to study reapportionment. The majority favored action similar to Amendment No. 7 and the minority recommended action substantially the same as the 1956 proposal and Amendment No. 8. Attempts of the legislature to agree on a reapportionment measure failed. An effort to compel apportionment by state court action failed.³⁰ During the spring of 1962 Amendments 7 and 8 were initiated by petition. Intensive campaigns were waged in support of each.³¹ The voters adopted Amendment No. 7 and rejected Amendment No. 8.³²

The choice of the voters is now before the court. By their action they have apportioned the House on a population basis and have recognized other factors in the apportionment of the Senate. Consideration must next be given to the deviations from equality of representation which occur in the apportionment of the Senate.

Appendix C following this opinion contains tables giving, for each of the four regions delineated by the de-

³⁰In re Legislative Reapportionment, Colo....., 374 P.2d 66.

³¹The witness Edwin C. Johnson, three times Governor and three times United States Senator from Colorado, was one of the sponsors of Amendment No. 7. After mentioning the fact that No. 7 carried in every county and No. 8 lost in every county, he said: "It is very unusual in the annals of Colorado politics that any proposal or candidate receive a plurality in each and every county of this diverse state. Especially as to ballot proposals, there is normally a large built-in negative vote. If people do not understand a proposal, they vote 'no'. I believe that the principal reason for the character of the vote on Amendment 7 is that the issues were very clearly defined, not only by the continuous activities above described from 1953 through 1962, but also in the campaign itself. The proponents of each amendment were highly organized, and they conducted a campaign in every nook and crannie of the state. * * * In addition both proposals were heavily advertised, pro and con, and were the subject of front page editorial treatments by the newspapers of the state. Every communication medium was filled with discussion of this issue for months prior to election day. In short, in these campaigns, the people were intensely interested, fully informed and voted accordingly."

³²Amendment No. 7 was adopted by a vote of 305,700 to 172,725 (63.89% for and 36.11% against), and carried in every county of the state. Amendment No. 8 lost by a vote of 311,749 to 149,822 (67.54% against and 32.46% for), and was defeated in every county of the state.

fense experts, the senatorial apportionment under Amendment No. 7, listing constituent counties, the area in square miles, the population, the apportionment of senators and the population per senator.

The tables disclose that in the Western Region there are eight senatorial districts to which are apportioned eight senators. This region has 13% of the state population, 45.47% of the state area and 20.5% of the senators. There is one senator for each 28,480 persons.

The Eastern Region contains five senatorial districts, to which are apportioned five senators. The region has 8.1% of the state population, 26.21% of the state area and 12.8% of the senators. There is one senator for each 28,407 persons.

The South Central Region contains three senatorial districts, to which are apportioned three senators. The region has 3.8% of the state population, 13.99% of the state area and 7.7% of the Senate membership. There is one senator for each 22,185 persons.

The East Slope Region contains twenty-three senatorial districts, to which are apportioned twenty-three senators. The region has 75.1% of the state population, 14.33% of the state area, and 59.0% of the Senate membership. There is one senator for each 57,283 persons.

The three metropolitan areas of the state have a combined population of 1,191,832 persons or 67.95% of the state total and elect twenty or a majority of the thirty-nine senators. The Denver Metropolitan Area has a population of 929,383 persons or 52.99% of the state total and elects sixteen senators. The City and County of Denver, the central portion of the Denver Metropolitan Area, is allotted eight senators. The suburban portion (Adams, Arapahoe, Boulder, and Jefferson Counties) of the same area is allotted a total of eight senators.

The combination of districts which would result in the election of a majority of the Senate by the smallest population is reached by taking Boulder County out of the Denver Metropolitan Area and adding it to the nonmetropolitan areas. This would result in a population of 636,369 persons or 36.28% of the state total electing a majority of the Senate.

Appendix D to this opinion gives the ratio of the population per senator in each district to the population of the district having the least number of persons represented by a senator. The highest ratio, that of Districts Nos. 11 and 12 over District No. 23, is 3.6 to 1.

The heterogeneous characteristics of Colorado justify geographic districting for the election of the members of one chamber of the legislature. In no other way may representation be afforded to insular minorities. Without such districting the metropolitan areas could theoretically, and no doubt practically, dominate both chambers of the legislature.

The plaintiffs make much of the disparities in senatorial representation which vary downward from 3.6 to 1. They say that the deviations from per capita standards are impermissible. We do not agree. The distributive scheme of Amendment No. 7 may not be perfect but it does recognize the geographic diversities, the historic grouping of counties, and the accessibility of a candidate to the voters and of a senator to his constituents. The realities of topographic conditions with their resulting effect on population may not be ignored. For an example, if the contention of the plaintiffs was to be accepted, Colorado would have one senator for approximately every 45,000 persons. Two contiguous Western Region senatorial districts, Nos. 29 and 37, have a combined population of 51,675 persons inhabiting an area of 20,514 square miles.³³ The division of this area

³³Each of nine states, Rhode Island, Delaware, Connecticut, Hawaii, New Jersey, Massachusetts, New Hampshire, Vermont, and Maryland contains less area.

into two districts does not offend any constitutional provisions. Rather, it is a wise recognition of the practicalities of life. An analysis of the other senatorial districts in all the regions except the populous East Slope would merely emphasize the point.

We are convinced that the apportionment of the Senate by Amendment No. 7 recognizes population as a prime, but not controlling, factor and gives effect to such important considerations as geography, compactness and contiguity of territory, accessibility, observance of natural boundaries, conformity to historical divisions such as county lines and prior representation districts, and "a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses."³⁴

The plaintiffs rest their cases on the argument that the apportionment of the Senate by Amendment No. 7 is arbitrary, invidiously discriminatory, and without any rationality. The voters of Colorado have themselves answered these charges. By adopting Amendment No. 7 and by rejecting Amendment No. 8, which proposed to apportion the legislature on a per capita basis, the electorate has made its choice between the conflicting principles.

The initiative gives the people of a state no power to adopt a constitutional amendment which violates the Federal Constitution. Amendment No. 7 is not valid just because the people voted for it. If the republican form of government principle is not a useable standard because it poses political rather than judicial questions, the observation is still pertinent that Amendment No. 7 does not offend such principle. If the true test is the denial of equal right to due process, we face the traditional and recognized criteria of equal protection. These are arbitrariness, discrimi-

³⁴W.M.C.A., Inc., v. Simon, S.D.N.Y., 208 F.Supp. 368, 379, probable jurisdiction noted U.S., June 10, 1963. See also Mann v. Davis, E.D.Va., 213 F.Supp. 577, 584, probable jurisdiction noted, U.S., June 10, 1963.

nation, and lack of rationality. The actions of the electorate are material to the application of the criteria. The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behavior of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary.

The electorate of every county from which the plaintiffs come preferred Amendment No. 7. In the circumstances it is difficult to comprehend how the plaintiffs can sue to vindicate a public right. At the most they present a political issue which they lost. On the questions before us we shall not substitute any views which we may have for the decision of the electorate. In *Ferguson, Attorney General of Kansas, v. Skrupa*, 372 U.S. 726, 731, the Supreme Court said that it refused to sit as a "superlegislature to weigh the wisdom of legislation."³⁵ Similarly, we decline to act as a superelectorate to weigh the rationality of a method of legislative apportionment adopted by a decisive vote of the people.

We believe that no constitutional question arises as to the actual, substantive nature of apportionment if the popular will has expressed itself.³⁶ In *Baker v. Carr* the situation was such that an adequate expression of the popular view was impossible. In Colorado the liberal provisions for initiation of constitutional amendments permit the people to act—and they have done so. If they become dissatisfied with what they have done, a workable method of change is available. The people are free, within the framework of the Federal Constitution, to establish the governmental forms which they desire and when they have acted

³⁵Quoted from *Day-Brite Lighting, Inc., v. Missouri*, 342 U.S. 421, 423.

³⁶See McCloskey, "The Reapportionment Case," 76 *Harvard Law Review* 54, 71-72.

the courts should not enter the political wars to determine the rationality of such action.

Each case is dismissed and all parties shall bear their own costs. The Findings of Fact and Conclusions of Law of the court are set out in this opinion as permitted by Rule 52(a), F.R.Civ.P. The clerk will forthwith prepare and submit an appropriate form of judgment.

DONE at Denver, Colorado this day of July, 1963.

BY THE COURT

Jean S. Breitenstein
United States Circuit Judge,
Tenth Circuit

Alfred A. Arraj
Chief Judge, United States
District Court

APPENDIX A

INITIATED AMENDMENT No. 7.

1962 Colo. Gen. Election

"SECTION 1. Sections 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47 and 48 of Article V are adopted, to read as follows:

"SECTION 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties, they shall be contiguous.

"Section 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

"Section 47. SENATE. The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

"Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Sections 45, 46 and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be as provided by law."

APPENDIX B

INITIATED AMENDMENT No. 8

1962 Colo. Gen. Election

"Sections 45 and 47, Article V, of the Constitution of the State of Colorado, are hereby amended to read as follows:

"Section 45. APPORTIONMENT BY COMMISSION.

(A) There shall be established a Commission for Legislative Apportionment composed of three members who shall be qualified electors of the State of Colorado, no more than two of whom shall be of the same political party, to serve for a term of eighteen months from the time of their appointment. One member shall be appointed by each of the following in this order: by the Attorney General prior to June 1, by the Lieutenant Governor prior to June 15 and by the State Board of Education prior to July 1, of each year of appointment. The appointments shall be made prior to July 1, 1963, July 1, 1971 and July 1 of each tenth year thereafter.

"(B) It shall be the duty of the commission to delineate senatorial and representative districts and to revise and adjust the apportionment of senators and representatives among such districts. The commission shall certify to the Colorado Supreme Court the boundaries of the senatorial and representative districts and the reapportionment of senators and representatives on or before January 2, 1964; January 2, 1972, and January 2 of each tenth year thereafter.

"(C) If such delineation and apportionment conforms to the requirements of sections 45 through 47 of this article, the court shall affirm the same. If such delineation and apportionment does not conform to the said requirements, or if for any reason whatever the same is not certified to the

court, then the court shall delineate senatorial and representative districts and adjust the apportionment among such districts. The court shall rule on or before April 15 of each year set forth in paragraph (B) of this section, with such districting and apportionment to become effective on the date of the court's ruling. The court shall notify forthwith the secretary of state and the clerk of each county of its ruling.

“(D) The commission shall determine a strict population ratio for the senate and for the house by dividing the total state population as set forth in each decennial United States Census by the number of seats assigned to the senate and house, respectively. No legislative district shall contain a population per senator or representative of $33\frac{1}{3}\%$ more or less than the strict population ratio, except mountainous senatorial districts of more than 5,500 square miles, where the major portion of the district lies west of the 28th meridian of longitude west from Washington, D.C., but no such senatorial district shall contain a population of less than 50% of the strict population ratio.

“(E) It is the intent that sparsely populated areas shall have maximum representation within the limits set forth in paragraph (D) and that population per legislator in densely populated areas shall be as nearly equal as possible.

“Section 47. SENATORIAL AND REPRESENTATIVE DISTRICTS. (A) Senatorial districts may consist of one county or two or more contiguous counties but no county shall be divided in the formation of a senatorial district.

“(B) Representative districts may consist of one county or two or more contiguous counties, except that any county which is apportioned two or more representatives may be divided into representative sub-districts; Provided, that, a majority of the voters of that county approve in a

general election the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large.

“(C) Any proposal to divide a county into subdistricts shall be placed on the ballot only by initiative petition filed with the secretary of state according to the requirements set forth for statewide initiated measures in Article V, Section 1, of this constitution and statutes enacted thereunder; Provided, that, the requirements for the number of signatures and publication shall be determined for that county instead of for the state.

“(D) Subdistricting measures may be placed on the ballot at the general elections of 1966, 1974, and at the general elections held each tenth year thereafter and at no other times. Any such measure shall take effect pursuant to the provisions of Article V, Section 1, of this constitution and shall remain in effect until repealed or revised by the people through another initiated measure, except that when the apportionment of representatives to any subdistricted county is increased or decreased by the commission for legislative apportionment, the commission may, subject to the review provided in Section 45, paragraph (C), of this article, amend the subdistricting in said county as necessary to conform to the new apportionment.

“(E) A candidate for representative in any subdistricted county need not reside in the subdistrict in which he is a candidate.

“(F) No part of any county may be combined with another county or part of another county in the formation of any senatorial or representative district.”

APPENDIX C
APPORTIONMENT OF THE SENATE BY AMENDMENT NO. 7
(Grouped by Regions)

<u>Sen.*</u> <u>Dists.</u>	<u>Counties</u>	<u>Square Miles</u>	<u>Population</u>	<u>Sena-</u> <u>tors</u>	<u>Population</u> <u>Per</u> <u>Senator</u>
WESTERN REGION					
24	Chaffee	1,040	8,298		
	Park	2,178	1,822		
	Gilpin	149	685		
	Clear Creek	395	2,793		
	Douglas**	844	816		
	Teller	555	2,495		
		5,161	20,909	1	20,909
25	Fremont	1,562	20,196		
	Custer	738	1,305		
		2,300	21,501	1	21,501
27	Delta	1,161	15,602		
	Gunnison	3,243	5,477		
	Hinsdale	1,062	208		
		5,466	21,287	1	21,287
29	Rio Blanco	3,264	5,150		
	Moffat	4,761	7,061		
	Routt	2,331	5,900		
	Jackson	1,628	1,758		
	Grand	1,869	3,557		
		13,853	23,426	1	23,426
32	Mesa	3,334	50,715	1	50,715
33	Montrose	2,240	18,286		
	Ouray	540	1,601		
	San Miguel	1,284	2,944		
	Dolores	1,029	2,196		
		5,093	25,027	1	25,027

*The districts are numbered as in H.B. 65. Before the adoption of Amendment No. 7, the state was divided into 25 senatorial districts by Colo. Rev. Stat. Ann. § 63-13 (1953), and 35 senators were apportioned to those districts. Amendment No. 7 retained the same district boundaries except that Elbert County was removed from the district which included Arapahoe County also and was added to the district previously consisting of Kit Carson, Cheyenne, Lincoln, and Kiowa Counties. Arapahoe was left in a district by itself. The membership in the Senate was increased to 39 by apportioning one additional senator each to the suburban counties of the Denver Metropolitan Area, that is, Adams, Arapahoe, Boulder and Jefferson Counties. Counties apportioned more than one senator were to be divided by the legislature into senatorial districts as nearly equal as may be in population. This division was made by H.B. 65. The action so taken is not at issue in these cases.

**Douglas County is a part of the East Slope Region, but because of its peculiarities is joined with five Western Region counties to form a senatorial district.

<u>Sen. Dist.</u>	<u>Counties</u>	<u>Square Miles</u>	<u>Population</u>	<u>Senators</u>	<u>Population Per Senator</u>
35	San Juan	392	849		
	Montezuma	2,097	14,024		
	La Plata	1,691	19,225		
	Archuleta	1,364	2,629		
		5,544	36,727	1	36,727
37	Garfield	3,000	12,017		
	Summit	616	2,073		
	Eagle	1,686	4,677		
	Lake	384	7,101		
	Pitkin	975	2,381		
		6,661	28,249	1	28,249
	Western Region (8 Districts.) (30 Counties)	47,412	227,841	8	28,480

EASTERN REGION

28	Logan	1,849	20,302		
	Sedgwick	554	4,242		
	Phillips	680	4,440		
		3,083	28,984	1	28,984
34	Kit Carson	2,171	6,957		
	Cheyenne	1,772	2,789		
	Lincoln	2,593	5,310		
	Kiowa	1,794	2,425		
	Elbert	1,864	3,708		
		10,194	21,189	1	21,189
36	Yuma	2,383	8,912		
	Washington	2,530	6,625		
	Morgan	1,300	21,192		
		6,213	36,729	1	36,729
38	Otero	1,276	24,128		
	Crowley	812	3,978		
		2,088	28,106	1	28,106
39	Bent	1,543	7,419		
	Prowers	1,636	13,296		
	Baca	2,565	6,310		
		5,744	27,025	1	27,025
	Eastern Region (5 Districts.) (16 Counties)	27,322	142,033	5	28,407

<u>Sen. Dist.</u>	<u>Counties</u>	<u>Square Miles</u>	<u>Population</u>	<u>Sen- tors</u>	<u>Population Per Senator</u>
SOUTH CENTRAL REGION					
23	Las Animas	4,798	19,983	1	19,983
30	Huerfano	1,580	7,867		
	Costilla	1,220	4,219		
	Alamosa	723	10,000		
		3,523	22,068	1	22,088
31	Saguache	3,146	4,473		
	Mineral	923	424		
	Rio Grande	916	11,160		
	Conejos	1,274	8,428		
		6,259	24,485	1	24,485
	South Central (3 Districts, (8 Counties)	14,580	66,554	3	22,185
EAST SLOPE REGION					
1-8	Denver	73	493,887	8	61,736
9-10	Pueblo	2,414	118,707	2	59,353
11-12	El Paso	2,159	143,742	2	71,871
13-14	Boulder	758	74,254	2	37,127
15-16	Weld	4,033	72,344	2	36,172
21-22	Jefferson	791	127,520	2	63,760
26	Larimer	2,640	53,343	1	53,343
19-20	Arapahoe	815	113,426	2	56,713
17-18	Adams	1,250	120,296	2	60,148
	East Slope (23 Districts, (9 Counties)	14,933	1,317,519	23	57,283

<u>Areas</u>	<u>Square Miles</u>	<u>Population</u>	<u>Senators</u>	<u>Population Per Senator</u>
Colorado (39 Districts, 163 Counties)	104,247	1,753,947	39	44,973

Denver Metropolitan Area (Denver, Boulder, Jefferson, Arapahoe and Adams Counties) (16 Districts, 5 Counties)	3,687	929,383	16	58,086
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All Standard Metro- politan Statistical Area ("Denver"- Adams, Arapahoe, Boulder, Denver, and Jefferson Counties; "Colorado Springs"-El Paso County; and "Pueblo"- Pueblo County) (20 Districts) (7 Counties)	8,260	1,191,832	20	59,592
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APPENDIX D

RATIO OF POPULATION PER SENATOR IN EACH DISTRICT TO THE POPULATION OF THE DISTRICT HAVING THE LEAST NUMBER OF PERSONS REPRESENTED BY A SENATOR

(Grouped by Regions)

<u>District</u>	<u>Population Per Senator</u>	<u>Least Population Per Senator</u>	<u>Ratio</u>
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WESTERN REGION

24	20,909	19,983	1.0-1
25	21,501	19,983	1.1-1
27	21,287	19,983	1.1-1
29	23,426	19,983	1.2-1
32	50,715	19,983	2.5-1
33	25,027	19,983	1.3-1
35	36,727	19,983	1.8-1
37	28,249	19,983	1.4-1

EASTERN REGION

28	28,984	19,983	1.5-1
34	21,189	19,983	1.1-1
36	36,729	19,983	1.8-1
38	28,106	19,983	1.4-1
39	27,025	19,983	1.4-1

SOUTH CENTRAL REGION

23	19,983	19,983	1-1
30	22,086	19,983	1.1-1
31	24,485	19,983	1.2-1

EAST SLOPE REGION

1 - 8	61,736	19,983	3.1-1
9 - 10	59,353	19,983	3.0-1
11-12	71,871	19,983	3.6-1
13-14	37,127	19,983	1.9-1
15-16	36,172	19,983	1.8-1
21-22	63,760	19,983	3.2-1
26	53,343	19,983	2.7-1
19-20	56,713	19,983	2.8-1
17-18	60,148	19,983	3.0-1

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 508

ANDRES LUCAS AND ARCHIE L. LISCO, APPELLANTS

v.

**THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE
OF COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE
OF COLORADO, ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (R. 153-190)¹ is reported at 219 F. Supp. 922. A prior opinion of the three-judge district court (R. 31-48) is reported at 208 F. Supp. 471.

JURISDICTION

The judgment of the district court was entered on July 16, 1963 (R. 206). Notices of appeal to this Court were filed by appellant Lucas on August 1,

¹Since the record is not printed, references are to the original record.

1963 (R. 387-395), and by appellant Lisco on August 16, 1963 (R. 397-409). Probable jurisdiction was noted on December 9, 1963. 375 U.S. 938. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the complaint should have been dismissed for want of equity under all the circumstances, including the fact that a majority of voters in each county approved the present apportionment plan and rejected a plan providing for the apportionment of both houses on the basis of population when other issues were also prominent factors in the vote.

2. Whether the provisions of the Colorado Constitution—which provide for a House of Representatives apportioned substantially in accordance with population but a Senate in which there are serious disparities in *per capita* representation, giving control to a small minority of the people—violate the Equal Protection Clause of the Fourteenth Amendment.

STATUTES INVOLVED

The relevant provisions of the Colorado Constitution and laws are summarized in the statement, pp. 4-5, and set forth in Appendix A, pp. 61-62.

INTEREST OF THE UNITED STATES

This is one of six reapportionment cases pending disposition in which the Court is called upon to formulate under the Fourteenth Amendment constitutional principles applicable to challenges to malapportionment of a State legislature. The Court has

heard argument in the New York, Alabama, Maryland, Virginia, and Delaware cases. The United States filed its principal brief in *Maryland Committee for Fair Representation v. Tawes*, No. 29, this Term, and there attempted to present a compendious analysis of principles applicable to legislative apportionment. The instant case raises specific problems in the application of those principles.

STATEMENT

1. *The Complaint and Initial Proceedings.* This appeal grows out of two consolidated actions filed in the District Court for the District of Colorado by registered voters and taxpayers resident in Adams, Arapahoe, Denver, and Jefferson Counties, Colorado, in behalf of themselves and all other persons similarly situated, against State officials, challenging the constitutionality under the Fourteenth Amendment of the apportionment of the Colorado legislature pursuant to Article V, Sections 45, 46, and 47 of the Colorado Constitution and Colorado Revised Statutes, Sections 63-1-2, 63-1-3, and 63-1-6. (R. 1-7, 208-222).² The sponsors of the current apportionment, which was then to be voted upon in a referendum (proposed Amendment No. 7 to the State Constitution), were permitted to intervene (R. 31-32, 335). After trial before a three-judge court, the district court decided that it had jurisdiction and the issue was justiciable (R. 39); that grounds for abstention were lacking and sovereign immunity was not a defense (R. 40-

² In one case the State of Colorado was also named a defendant (R. 1).

41); and that the plaintiffs had made out a *prima facie* case of discrimination which had not been rebutted by the defendants (R. 45-46). The court then continued the cases without further action because of the impending general election in November 1962, at which time the people of Colorado would vote on two initiated constitutional amendments dealing with legislative apportionment (R. 46-48).

Amendment No. 7 was adopted at the election and the prior issues dropped out of the case.

2. *The Adoption of the Current Apportionment.* At the election in November 1962 the people of Colorado voted upon two proposals for reapportionment of the legislature: (a) Amendment No. 7, which was adopted by a vote of 305,700 to 172,725, and (b) Amendment No. 8, which was defeated by a vote of 149,822 to 311,749.

Amendment No. 7 called for the establishment of a General Assembly composed of a Senate of 39 members and a House of 65 members. The ~~State~~ State would be divided into 39 senatorial districts and 65 representative districts. The legislature was to have the responsibility of creating the House districts "as nearly equal in population as may be." The allocation of senators among the counties was to follow the existing districts and apportionment, "which shall not be repealed or amended other than in numbering districts," except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson, and Lincoln would be formed into one district, and one additional senator would be apportioned to each of the counties of Adams, Arapahoe, Boulder, and Jefferson. Within a county apportioned

more than one senator, senatorial districts would be established by the legislature "as nearly equal in population as may be." Amendment No. 7 also provided that after each Federal Census there should be a revision of representative districts and senatorial districts within counties apportioned more than one senator, so as to conform to the foregoing requirements (R. 180-181; 219 F. Supp. at 933-934).

Amendment No. 8 (see Appendix A, pp. 62-65), on the other hand, proposed to create a three-man commission to apportion both houses of the legislature periodically. The commission would have the duty of delineating senatorial and representative districts and revising and adjusting the apportionment of senators and representatives among such districts (R. 182). Its decisions would be reviewable by the Colorado Supreme Court. The commission would be required to determine a strict population ratio for both the Senate and the House by dividing the total State population as set forth in each decennial United States Census by the number of seats assigned to the Senate and House, respectively. No legislative district should contain a population per senator or representative of $33\frac{1}{3}$ percent more or less than the strict population ratio, except certain mountainous senatorial districts of more than 5,500 square miles, but no such senatorial district was to contain a population of less than 50 percent of the strict population ratio (R. 183). Senatorial districts should consist of one county or two or more contiguous counties, but no county should be divided in the formation of a senatorial district. Representative districts should consist of one county or two or more

contiguous counties. Any county apportioned two or more representatives could be divided into representative subdistricts but only after a majority of the voters in the county had approved, in a general election, the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large. A proposal to divide a county into subdistricts could be placed on the ballot only by initiative petition in accordance with State law, and only at the general elections of 1966, 1974, and at the general election held each ten years thereafter (R. 183-184; 219 F. Supp. at 934-935).

The voters approved Amendment No. 7 and defeated No. 8 by substantial majorities in every county R. 76-78).

3. *Trial Proceeding Following the Adoption of Amendment No. 7.* After the 1962 election the pleadings were amended to convert the case into a test of the constitutionality of the apportionment under Amendment No. 7 (R. 51-54, 372-381). Plaintiffs requested a declaration that Amendment No. 7 was unconstitutional under the Fourteenth Amendment and a decree reapportioning the legislature on the basis of population (R. 54, 380-381).

In May 1963 the case went to trial (R. 465). The court ordered that all proceedings theretofore had in the case, "including all testimony, evidence, and exhibits, and the transcript and record thereof be made a part of the * * * trial proceedings" (R. 116).

The defendants introduced exhibits which showed the history of legislative apportionment in Colorado. Since the adoption of the Colorado Constitu-

tion in 1876, the General Assembly of Colorado has been reapportioned or redistricted on the following occasions: 1881, 1891, 1901, 1909, 1913, 1932, 1953 (Def. Ex. E-E 6), and, with the adoption of Amendment No. 7, in 1962.³ The 1932 measure was an initiated act, adopted because the General Assembly had neglected to perform its duty under the State constitution. In 1933 the General Assembly attempted to thwart the initiated measure by adopting its own legislative reapportionment Act, but the latter measure was held unconstitutional. See *Armstrong v. Mitten*, 95 Colo. 425, 37 P. 2d 757.

The 1953 apportionment (see Appendix A, pp. 65-67), which was in effect immediately prior to Amendment No. 7, is important because it established the foundation for the present apportionment of the State Senate. The controlling statute fixed the number of senators at 35 and established 25 fixed senatorial districts, composed of one or more whole counties. 1953 Colo. Rev. Stat. 63-1-1, 63-1-3. Senators were to be apportioned among the districts, one for the first 19,000 of population and one for each additional 50,000 or fraction over 48,000. Between 1950 and 1960 the population of Colorado's urban areas increased 55.5 percent and the population of the rural areas decreased 6.6 percent (R. 291). The original formula for apportioning the Senate, plus the tremendous shifts in population, gave rise to gross disparities in *per capita* representation. For example, by 1960 Jefferson County with 127,520 residents was represented by only one senator while the

³ Minor revisions involving only a few counties are not included in the above list (R. 480-481).

smallest senatorial district, the Eighteenth District, with a population of 17,481, had the same representation—a disparity of more than 7 to 1 (Pl. Ex. 8). Nineteen of the 35 senators—more than a majority—came from districts containing only 556,912 people whereas 1,207,035 residents of the more populous districts elected only 16 Senators (Pl. Ex. 5).

Since the current apportionment of the lower house achieves equal *per capita* distribution of representatives among the several counties, there is no need to consider the details. The current apportionment of the Senate is based upon the 1953 apportionment. Amendment No. 7, as explained above, split Elbert County from Arapahoe and put it in one district with Lincoln, Kit Carson, Cheyenne, and Kiowa Counties. It then created four new senate seats, bringing the total membership to 39, and gave one additional senator each to Adams, Arapahoe, Boulder, and Jefferson Counties. Plaintiffs introduced elaborate statistical evidence showing the resulting *per capita* representation of the several Senate districts both individually and in typical groups. Since the comparisons are chiefly matters of argument, we reproduce here only the 1960 populations of the various districts, together with the percent of the ideal ratio represented by the senator or senators from each district:

* The figures here and elsewhere in this brief are computed from the basic statistics set forth in Appendix C to the opinion of the district court (R. 186-190). The most convenient maps are inside the front and back covers of the Report of the Denver Research Institute, a separate volume introduced into evidence, a copy of which has been furnished to the Court.

Districts	Counties	Population	Senators	Population Per Senator	Percent of Ideal Representation
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WESTERN REGION

24	Chaffee, <i>et al.</i>	20,909	1	20,909	215
25	Fremont, Custer	21,501	1	21,501	209
27	Delta, <i>et al.</i>	21,287	1	21,287	211
29	Rio Blanco, <i>et al.</i>	23,436	1	23,436	192
32	Mesa	30,715	1	30,715	89
33	Montrose, <i>et al.</i>	25,027	1	25,027	190
36	San Juan, <i>et al.</i>	36,727	1	36,727	122
37	Garfield, <i>et al.</i>	28,249	1	28,249	150

EASTERN REGION

28	Logan, <i>et al.</i>	28,984	1	28,984	155
34	Kit Carson, <i>et al.</i>	21,189	1	21,189	212
36	Yuma, <i>et al.</i>	36,729	1	36,729	122
38	Otero, Crowley	28,106	1	28,106	190
39	Bent, <i>et al.</i>	27,025	1	27,025	196

SOUTH CENTRAL REGION

23	Las Animas	19,983	1	19,983	225
30	Huerfano, <i>et al.</i>	22,086	1	22,086	204
31	Saguache, <i>et al.</i>	24,485	1	24,485	184

EAST SLOPE REGION

1-8	Denver	493,887	8	61,736	73
9-10	Pueblo	118,707	2	59,353	76
11-12	El Paso	143,742	2	71,871	63
13-14	Boulder	74,254	2	37,127	121
15-16	Weld	72,344	2	36,172	124
21-22	Jefferson	127,520	2	63,760	71
26	Larimer	63,343	1	63,343	84
19-20	Arapahoe	113,426	2	56,713	79
17-18	Adams	120,296	2	60,148	75

The defendants and intervenors introduced evidence concerning the history, geographic features, and economic interests of Colorado in order to demonstrate that the apportionment provided by Amendment No. 7 had a rational basis. One of their principal items of evidence was a report, prepared by the Denver Re-

search Institute, entitled "Economic Analysis of State Senatorial Districts in Colorado" (Def. Ex. D), which described the economic and geographic character of each senatorial district. The report contains considerable useful information, including maps. Two of the four witnesses who testified for the defendants (John G. Welles and Dean C. Coddington) supervised the preparation of the Report (R. 546, 549), and explained it on the witness stand (R. 543-579). A third, John P. Lawson, a retired professor of political science, testified generally with respect to the derivation of the bicameral legislature (R. 579-615); he stated that, without being reflected in the State constitutions, the State senates in this country historically had represented economic interests and were less closely tied to the people than the lower houses (R. 585-587), and that Amendment No. 7 was consistent with that history (R. 588).

The fourth witness, James Grafton Rogers, testified as an expert on the government, history, economics, topography, and geography of Colorado (R. 469-476). Mr. Rogers stated that the mountain ranges in the western part of the State had caused problems of communication (R. 476). He testified that throughout Colorado history there had been an effort to take into consideration area and economic interests, as well as population, in the Colorado Senate (R. 483-484). He said that the legislature had historically tried to join counties with a common economic and social interest "in a fashion in which a representative or a senator was able to reach his people" and tried to avoid including large and small counties in the same district

because of fear that the latter would be disregarded (R. 488-489). Mr. Rogers produced maps (Def. Ex. E-E6) showing the apportionment of the State Senate through Colorado's history (R. 480). Mr. Rogers concluded that the apportionment in Amendment No. 7 was rationally based on historical, economic, social, and geographic factors (R. 489). On cross-examination, he was unable to give any formula by which it could be determined how much representation each of the varying interests in Colorado should be given (R. 499-500). He argued that heavily populated areas were dangerous if given equal representation "because the cities from their very fact of population could organize in a way in which they had much greater strength. They were subject to political machines, subject to the activities of chambers of commerce and various other organizations, elements which were not applicable to rural areas * * *" (R. 503-504). Mr. Rogers noted that a major issue in Colorado was the division of water between the eastern and western slopes of the Rocky Mountains, and said that Amendment No. 7 was designed to reflect these different interests (R. 518-522).

The intervenors put on two witnesses. Joseph F. Little testified with respect to the factors which motivated the group sponsoring Amendment No. 7. He stated that they had wanted, *inter alia*, to provide for districting within populous counties (R. 622-623); to take Colorado topography, with its problems of accessibility and its natural boundaries, into account (R. 623, 640); to balance the advantages which Den-

ver and other home rule cities enjoyed⁵ (R. 623-624); to provide for homogeneity in language within districts in Spanish-speaking areas (R. 624), and to take account of the fact that in certain counties (such as El Paso, which contains the Air Force Academy) the population as computed by the census includes a large number of persons who are transients and do not vote, and that in other counties, with declining industry and business, resident population is less than the voting population, since many absentee ballots are cast.⁶ Mr. Little also testified that a legislature "should number among its members not only experts but also those who have practical experience in such matters as water, agriculture, stock raising, the tourist industry, lumbering, mining and all the other various pursuits * * * in the State of Colorado" (R. 648-649).

The second witness produced by the intervenors was Edwin C. Johnson, three-term Governor and three-term United States Senator from Colorado (R. 434),

⁵ Mr. Little asserted that the legislature was not as important to the County of Denver because it was a home rule city which originated much of the legislation which ordinarily would come from the legislature (R. 644). A tabulation of Colorado Home Rule Cities and their populations is contained in Intervenor's Ex. E.

⁶ Thus, for example, El Paso County, with a total population of 143,742, has 56,501 registered voters—a percentage of approximately 39 percent. Gilpin County, with a population of 685, has 720 registered voters (105 percent), and Hinsdale, with 208 people, has 280 registered voters (135 percent). (Intervenor's Ex. D). Denver has a percentage of registered voters, 52 percent (259,039 registered voters out of 493,887 population), exceeding the statewide average, which is 50 percent. All these figures are taken from Intervenor's Ex. D.

who, like Mr. Little, was one of the sponsors of Amendment No. 7. Besides testifying, he submitted an affidavit in which he elaborated upon his prior testimony (R. 138). In that affidavit, Mr. Johnson asserted that the issues in the November 1962 election were very clearly defined as the result of organized campaigns on behalf of both Amendments 7 and 8 and widespread newspaper publicity (R. 142). He warned of the dangers of an urban-dominated legislature (R. 144). He said that Amendment No. 7 was designed to balance the power of Denver and the surrounding suburban counties—which had been fighting over bills to give Denver authority to annex neighboring areas—by giving each side eight Senate seats (R. 145-146). And he cited the importance of an effective voice for each of the various interests in Colorado so that its resources could be developed (R. 146-149).

4. *The Decision of the District Court.* The three-judge court divided 2-1 in sustaining the validity of the senate apportionment (Circuit Judge Breitenstein and District Judge Arraj in the majority; District Judge Doyle dissenting). In dismissing the complaints, the court first held that the Fourteenth Amendment does not require, "equality of population within representation districts for each house of a bicameral state legislature" (R. 163; 219 F. Supp. at 927). The court then inquired whether the deviation from *per capita* representation in the state senate was "rational" or "invidiously discriminatory" (R. 166; 219 F. Supp. at 928). After appraising each element in some detail, it then concluded that the

geographic diversities and economic groupings, the historic derivation of the districts, and the "accessibility of a candidate to the voters and of a senator to his constituents" gave the apportionment a rational basis (R. 176; 219 F. Supp. at 932). The court also stressed the fact that the apportionment had been adopted by popular vote in a recent State-wide referendum. "The contention that the voters have discriminated against themselves appalls rather than convinces. Difficult as it may be at times to understand mass behaviour of human beings, a proper recognition of the judicial function precludes a court from holding that the free choice of the voters between two conflicting theories of apportionment is irrational or the result arbitrary" (R. 178; 219 F. Supp. at 932).

Judge Doyle dissented upon two grounds. First, he concluded that "until there is some authoritative ruling to the contrary we must assume that equality of voting power is demanded with respect to both houses" (R. 195; 219 F. Supp. at 941). Second, he urged that the disparities in *per capita* representation in the State Senate could not be rationalized. History, he reasoned, was irrelevant; while it might explain, it could not justify. The geographic, topographic, and economic differences in the several parts of the State were not the basis of the apportionment. The geographic factor carried little weight in the light of modern methods of travel and communication. Economic interests changed too rapidly and were not entitled to a built-in priority. Both the popular adoption of the apportionment and opportunities for change by initiative and referendum were irrelevant because plaintiffs were en-

titled to judicial protection of what are personal constitutional rights.

SUMMARY OF ARGUMENT

I

The complaint should not be dismissed as an exercise of the equitable discretion to remit a plaintiff to other remedies where intervention would be inconsistent with a larger public interest. Save under the most extraordinary circumstances, the federal courts have a clear duty to adjudicate and enforce claims of unconstitutional discrimination resulting from malapportionment. Cf. *Wesberry v. Sanders*, No. 22, this Term, decided February 17, 1964.

The bare fact that an apportionment has been recently adopted by a majority of the people is not a circumstance that will justify dismissal for want of equity. "No plebiscite can legalize an unjust discrimination." *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649, 659 (E.D. La.), affirmed, 368 U.S. 515. The precept is normally applicable to discrimination affecting the value of a vote. Proof that a majority of the people have approved a particular apportionment resulting in *per capita* inequalities is usually insufficient to show acquiescence by all the classes prejudiced by the allegedly discriminatory classification, partly because they can rarely be separated out of the totals and partly because the significance of the vote may be clouded by cross-currents stirred by other consequences of the particular measure upon which the referendum was held. For similar reasons the opportunity to secure reapportionment by constitutional convention

or initiative and referendum is not an adequate reason for withholding equitable relief.

In the present case, however, appellees are able to make a unique plea for withholding equitable intervention. Proposed Amendment No. 7, which established the present apportionment, was approved by a majority of the voters in every Colorado county. In these circumstances there is great force to the argument that the *per capita* inequities have been approved by a majority of the members of each class alleged to suffer from unjust discrimination, for the classification of which appellants complain is the classification of voters by county for diverse *per capita* representation. Ordinarily, constitutional rights, being personal, do not depend even upon the will of a majority of the victims, but the right to equal representation is peculiar insofar as it cannot be enjoyed by individual members of the class without forcing it upon the majority favoring the challenged apportionment.

With the other factors closely balanced, the issue turns upon the character and extent of the alleged injury. In previous cases the United States has assumed *arguendo* that the Equal Protection Clause leaves room for accommodating, within limits, the principle of *per capita* equality and other non-invidious and relevant objectives of the electoral and representative process. The Government then advanced, among other principles, the proposition that disparities in *per capita* representation may be so gross in relation to any otherwise permissible objectives of the classification as to be arbitrary and capricious under settled constitutional principles. The

validity of that proposition will be determined in other pending apportionment cases. Insofar as appellants' challenge to the Colorado apportionment depends upon it, the Court should also determine the merits of the present controversy. However close the case may be as a matter of degree, this challenge breaks no new constitutional ground. Essentially the same kind of question of degree would have to be decided, even though the line might be drawn at a different point, in determining whether plaintiffs' injury, if any, was sufficient to warrant equitable relief.

On the other hand, if appellants cannot succeed without breaking new ground and obtaining a decision upon whether the Fourteenth Amendment requires that the seats in both houses of a State legislature be apportioned as nearly in proportion to population as practicable, their claim raises a novel and very difficult question, and the injury, if any, is necessarily small. Weighing this factor along with the peculiar circumstances discussed above, we suggest that the Court might wish to dismiss any such challenge without deciding its merits.

II

The inequalities in *per capita* representation in the Colorado legislature as a result of the discrimination against populous counties in the Senate are so serious as to deny appellants equal protection of the law. The fact that seats in the House are apportioned *per capita* does not excuse arbitrary and capricious discrimination in apportioning representation in the

Senate. The supposed federal analogy is inapposite not only because it resulted from a compromise between the claims of popular representation and theories of State sovereignty that have never been applicable to the governmental subdivisions of a single State, but also because there is no basis for a claim that Colorado's counties are represented as such in the upper branch of her legislature. The equality of representation in the House is constitutionally relevant, however, both because it results in more nearly equal representation in the total legislative process than plaintiffs are permitted in the Senate and also because it prevents a minority of the people from enacting legislation opposed by the majority.

The over-all discrimination in *per capita* representation resulting from the malapportionment of the Colorado Senate has no rational relation to permissible objectives of legislative apportionment. Such bases for discrimination as the desire to balance the voting power of the three metropolitan areas, to weight the representation of the State's diverse economic interests, and to balance the voting power of the counties with excess supplies of water against the water-hungry regions are not only irrelevant but invidious. Differentiations or classifications among voters whose function is to give one group more *per capita* representation than another are the antithesis of equality before the law.

The permissible objectives relied upon by appellees and the district court, such as the desire to avoid splitting counties and enable senators to keep in close touch with their constituents, could be substantially

achieved without creating the gross inequalities found under the current apportionment. In addition, the court below erred in giving too much weight to the objectives and too little to the value of the right to vote.

The present case is admittedly closer than those which preceded it, both because the Colorado House, unlike the lower branch in any of the other cases, is apportioned as nearly as practicable in accordance with population, and because the discrimination in *per capita* representation in the Senate is less than Maryland, Alabama, and Delaware, and also less than in New York if both branches are taken into account. In the Government's view, however, it should be decisive: (1) that the discrimination is so great as to give 75 percent of the voters, living in the eastern slope region, less than half the *per capita* representation in the Colorado Senate which it grants the 25 percent of the voters living in other regions, and permits counties containing less than one-third of the people to elect a numerical majority of the Senate; (2) that the trend of population growth is constantly increasing the discrimination; and (3) that the only relevant and non-invidious objectives could be substantially achieved without so much discrimination.

ARGUMENT

INTRODUCTION

This is the sixth case to come before the Court at the present Term involving a challenge to the apportionment of seats in a State legislature. The basic principles which the United States believes should

control the application of the Equal Protection Clause to State legislative apportionments now before the Court are analyzed in our briefs in the previous cases. See especially Briefs for the United States in *Maryland Committee for Fair Representation v. Tawes*, No. 29, this Term, and *Roman v. Sincock*, No. 307, this Term. We rest upon the same principles here. While recognizing that the issue is far more closely balanced than in the other cases, the United States takes the position that the judgment below should be reversed because the Colorado apportionment, although partly based upon permissible criteria, subordinates the principle of popular representation to other considerations to such a degree as to create serious inequalities in the representation of voters and give a veto in the legislature to a small minority of the people.

The dominant fact, in our view, is that the Colorado apportionment is so discriminatory as to give a majority of the seats in the State Senate to the voters in counties containing less than one-third of the population. The inequalities in *per capita* representation between overrepresented and underrepresented counties run as high as 3.6 to 1. The more populous and growing areas in which 68 percent of the people reside are allowed to elect only a bare majority of the State senators. The justifications advanced for this discrimination, so far as relevant, are inadequate.

Nevertheless, the present controversy differs from the prior cases in two important respects:

(1) The Colorado apportionment is an up-to-date apportionment adopted as a constitutional amendment

in 1962 in a popular referendum in which not only a large majority of all the voters but a majority in each county voted for the present apportionment in preference to an alternative proposal providing equal representation *per capita*.

(2) Seats in the House of Representatives are allocated in proportion to population and the discrimination, taking the legislature as a whole, is much less severe than that involved in the other five cases awaiting decision.

Since we do not ask the Court now to hold that seats in both houses of a bicameral legislature must be allocated as closely as practicable in accordance with population, the two issues that we deem critical result from the foregoing factual differences between this controversy and the earlier cases. They are:

(1) Should a court of equity stay its hand and leave plaintiffs to any other remedies on the ground that under all the circumstances, including the recent approval of the apportionment by a majority of the classes which plaintiffs claim to represent, the intervention of a court of equity would not be in the public interest?

(2) Does the unequal apportionment of seats in the Colorado Senate, measured *per capita*, create discrimination so gross, and give control to a minority so small, that, notwithstanding the justifications offered, it involves a denial of equal protection?

Since the latter question calls only for the application of principles that we believe will be settled in the other reapportionment cases now pending, we

urge that the Court should also reach the merits here and hold the present Colorado apportionment unconstitutional. However, if the Court rejects our view that the Colorado apportionment strikes an unreasonable balance, we suggest that the bill might be dismissed for want of equity without reaching further and more difficult constitutional questions.

I

THE COMPLAINT SHOULD NOT BE DISMISSED AS A MATTER OF EQUITABLE DISCRETION

It is a familiar principle that, since the power of a court of equity to act is in some measure discretionary, the court may stay its hand, without adjudicating the merits, when intervention would be contrary to the public interest, thus leaving the complainants to any other avenues of redress. See *United States v. Dern*, 289 U.S. 352, 359-360; *Pennsylvania v. Williams*, 294 U.S. 176, 185; *A.F. of L. v. Watson*, 327 U.S. 582, 593. The principle has been invoked in apportionment cases although never explicitly applied by a majority of the Court. See *Wood v. Broom*, 287 U.S. 1, 8-9 (dissenting opinion of Justices Brandeis, Stone, Roberts, and Cardozo); *Colegrove v. Green*, 328 U.S. 549, 564-566 (Mr. Justice Rutledge concurring); *MacDougall v. Green*, 335 U.S. 281, 284-287 (Mr. Justice Rutledge concurring). See also the opinion of Mr. Justice Clark concurring in *Baker v. Carr*, 369 U.S. 186, 258-259.

A federal court must normally exercise its jurisdiction to adjudicate and protect the constitutional right to equal protection of the laws in the allocation

of seats in a State legislature. Controversies over the constitutionality of congressional districting and legislative apportionment are justiciable. *Baker v. Carr*, 369 U.S. 186; *Wesberry v. Sanders*, No. 22, decided February 17, 1964. The jurisdiction is one that a court must exercise save under truly exceptional circumstances. *Baker v. Carr* points strongly in that direction, although the point was not squarely before the Court. *Wesberry v. Sanders* holds that "want of equity" is not a substitute for "non-justiciability," and that the delicacy of judicial supervision of political processes is not sufficient reason for withholding equitable protection for a constitutional right. Furthermore, the public interest is usually served best by a vigorous enforcement of constitutional rights. It has not been argued in any of the five preceding reapportionment cases that the bill should be dismissed in the exercise of equitable discretion. Had the argument been made, we would have urged that it be rejected as summarily as in *Wesberry v. Sanders*.

Manifestly, the fact that an apportionment is adopted in a popular referendum is not enough to sustain its constitutionality or to induce equity to stay its hand. Constitutional safeguards are for the protection of minorities. "No plebiscite can legalize an unjust discrimination." *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649, 659 (E.D. La.), affirmed, 368 U.S. 515. "One's right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the out-

come of no elections." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638. In *Moss v. Burkhardt*, 207 F. Supp. 885, 894 (W.D. Okla.), appeal dismissed, 374 U.S. 103, a three-judge district court, although noting the pendency of an initiative petition which would have transferred enforcement of the apportionment formula in the Oklahoma Constitution from the legislature to a Commission, nonetheless held the apportionment of seats in the legislature unconstitutional, stating that " * * * the right asserted * * * cannot be made to depend upon the will of the majority." Accord, *Thigpen v. Meyers*, 211 F. Supp. 826, 832 (W.D. Wash.), pending on appeal, No. 381, this Term; *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189, 192-193 (D. Neb.).

The foregoing principle seems plainly applicable whenever the challenge is to a crazy-quilt pattern of representation; it is no answer to the victims of capricious discrimination to say that the majority is content. *A fortiori*, relief against an apportionment like that in Virginia, which, either by accident or design, invidiously discriminates against the people of three localities, could not be withheld because a majority of the people of the State favored the discrimination. See Brief for the United States in *Davis v. Mann*, No. 69, this Term, pp. 30-33. The case is the same whenever the deviation from normal principles of popular representation is based upon impermissible grounds. See Brief for the United States in *WMCA, Inc. v. Simon*, No. 20, this Term, p. 28.

The instant case, however, presents a unique circumstance, not found in any other case coming to our attention, which argues more strongly for invoking the doctrine that equity may stay its hand when the

public interest requires, leaving the complainants to any other available remedies. The present Colorado apportionment was adopted after prolonged consideration. Apportionment has been an issue in Colorado since 1954. Proposed reapportionment measures were before the voters in 1954 and 1956 as well as 1962. This is not a case in which the problems of fair representation have been neglected or the channels for expressing the popular will have been closed. Cf. *Baker v. Carr*, 369 U.S. 186, 259 (Mr. Justice Clark concurring). On the contrary, the apportionment under attack was recently adopted in a State-wide referendum by substantial majorities in every county, including the counties which plaintiffs claim to be the victims of unconstitutional discrimination. The voters adopted the current apportionment not only as an improvement upon the *status quo* but in preference to an alternative measure which would have provided equal representation *per capita* in both branches of the legislature. The State-wide vote was 305,700 to 172,725 in favor of the present apportionment (R. 78). The votes in the most populous counties, all of which favored the current plan even though most of them suffer substantial underrepresentation in the State Senate, were as follows (R. 76-78):

Counties	Amendment 7		Amendment 8	
	For	Against	For	Against
Adams.....	14740	10771	11277	13843
Arapahoe.....	18193	12351	13576	16446
Boulder.....	12654	9636	8824	13811
Denver.....	75877	61183	55499	76208
El Paso.....	17480	11509	9175	18068
Jefferson.....	24815	17597	20229	21217
Larimer.....	10729	4251	2530	10806
Pueblo.....	14591	11555	7930	17820
Weld.....	10914	8017	2871	12337

o. The usual rule is that rights under the equal protection clause are "personal" rights. *Shelley v. Kraemer*, 334 U.S. 1, 22; *Sweatt v. Painter*, 339 U.S. 629, 635; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351; *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 161-162. The right of one individual cannot ordinarily be waived by others similarly situated, or even by a majority of a homogeneous group. Thus, in *McCabe v. Atchison, T. & S. F. Ry. Co.*, *supra*, 235 U.S. at 161-162, this Court rejected the argument that the limited demand by Negroes justified the State in permitting the furnishing of sleeping car, dining and chair car accommodations exclusively for white persons. And in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351, this Court held that the State of Missouri was bound to furnish the Negro plaintiff within its borders "facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity" (emphasis added). See also *Law v. Mayor and City Council of Baltimore*, 78 F. Supp. 346, 350 (D. Md.).

The general principle seems plainly applicable to the right to vote. If citizens of Mexican descent were barred from voting in Arizona, the right of an individual to relief could not be defeated by showing that a majority of the citizens of Mexican descent supported the discrimination. And two district courts have said that the right to equal protection in a legislative apportionment is also "personal." See *Sincock v. Duffy*, 215 F. Supp. 169, 184 (D. Del.), pending on appeal *sub nom. Roman v. Sincock*, No.

307, this Term; *Baker v. Carr*, 206 F. Supp. 341, 348 (M.D. Tenn.).

It seems apparent, however, that the problem of legislative apportionment has a distinctive aspect where the apportionment is favored by the voters of every geographical unit, including those alleged to be the victims of unconstitutional discrimination. There is no escape from treating the voters in a single representative district uniformly. It is impossible to give one man a different measure of representation than another in the same district. One voter cannot assert his right to equal representation while the others waive it in any meaningful sense. To put the point another way, every action to enforce a claimed constitutional right to greater *per capita* representation is a class action necessarily affecting all the voters in the district. Any relief granted to those who request it in the courts will unavoidably be forced upon those who rejected it at the polls. Under such circumstances the will of those similarly situated and necessarily affected would seem to be a factor that equity should take into account in deciding whether to intervene or stay its hand.

In the present case the weight of this factor must be discounted to some degree because the referendum did not present a single clear-cut choice between the challenged plan and equal representation *per capita*. The real choice was between Amendment No. 7, which was approved, and Amendment No. 8, which was rejected. There were three differences:

(1) Amendment No. 7 gave rural counties greater, and the urban and suburban counties less, representa-

tion in the Senate than Amendment No. 8, which called for apportioning seats in both houses in proportion to population.

(2) Amendment No. 7 itself apportioned the seats among the counties and multi-county districts, leaving only the task of dividing the multi-district counties to the legislature, whereas Amendment No. 8 delegated the entire task of laying out both Senate and House districts to a three-member Commission.

(3) Amendment No. 7 required the establishment of individual districts within the counties so that each representative district would choose one representative and each senatorial district one senator. Amendment No. 8 would have made little change in the mandate of the State constitution (Article V, Section 47) that "[n]o county shall be divided in the formation of a senatorial or representative district." It would have retained that provision for senatorial districts, and would have required that a proposal to divide a county into representative subdistricts be placed on the ballot by initiative petition and that a majority of the county's voters approve in a general election the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large (R. 184; 219 F. Supp. at 934-935).

It is impossible to say how far the vote in any county was swayed by any single factor. The second and third differences raised substantial issues. The third issue, involving the division of counties so as to reduce the number of names on the ballot, would have

been of special concern in the most populous counties. Perhaps it was what tipped the scale in favor of Amendment No. 7 in those counties, rather than any recognition of the virtues of weighting the apportionment of the State Senate in favor of the less populous counties.⁷ Perhaps not. All one can say with assurance is that the voters of each county preferred the weighted representation plus the other features of Amendment No. 7 over both Amendment No. 8 and the *status quo*.

Equity, in an appropriate case, may also take into account the opportunities for revision of an apportionment at the polls. See Mr. Justice Clark's concurring

⁷ The record indicates that this was an important part of Amendment No. 7. One of the principal purposes of the intervenors in sponsoring Amendment No. 7 was to do away with the requirement that no county be subdivided in forming a district. According to testimony presented by the intervenors, the result of that requirement was that (R. 417): " * * * in the larger counties such as Denver * * * there are so many candidates on the ballot it is impossible for the average voter to know more than just a few of whom he is voting for."

The requirement meant that in the City and County of Denver each citizen was represented "by seventeen representatives and eight senators" (R. 417-418)—a situation which amounted "to a lottery" (R. 418). For instance, in Denver if the names of the candidates " * * * begin with A, B, and C, if they get on the top line of the voting machine in the primary election and if they have some organized groups supporting them, they are almost certain to be elected. Seven out of our eight senators or as I recall it, from Denver have names beginning with A, B, or C" (R. 420). Thus one of the purposes of Amendment No. 7, but not of Amendment No. 8, was "to stop this situation of where a voter in Denver is confronted with a ballot of at least thirty-four candidates, seventeen Republican and seventeen Democrat * * *" (R. 426).

opinion in *Baker v. Carr*, 369 U.S. 186, 258-259. The bare opportunity to vote to summon a constitutional convention is an inadequate remedy, especially where seats in the convention will be apportioned in a discriminatory fashion. Too many cross-currents and uncertainties affect the plebiscite and the voter's opportunity to obtain relief for this to count as a practical avenue of political redress.

The initiative and referendum sometimes offer more feasible relief, although the variations in State laws and political practices as well as the character of any discrimination call for case-by-case analysis. In Colorado this avenue for expressing the majority's will seems readily available both in theory and through familiar use. The Colorado Constitution provides for the initiative and referendum of both "laws and amendments to the Constitution." Colo. Const., Art. V, § 1. Both may be adopted by a simple majority. A measure may be initiated when proposed by 8 percent of those who voted for Secretary of State in the last prior election. *Ibid.*; 1953 Colo. Rev. Stat. 70-1-5. In 1960 there were 578,186 such voters in Colorado, so that 46,255 signatures would be required. This is a comparatively modest number. Colorado has traditionally made free use of the initiative and referendum. While it is apparent that obtaining such signatures and organizing the necessary political support to carry an amendment in an election requires time, energy and considerable expense,⁸ Colorado's avenues of political relief appear both open and direct.

⁸ It has been argued that reapportionment cases concern the right of a single voter and that the initiative and referendum

The availability of potential political remedies is never enough, however, standing alone, to warrant the delay or denial of judicial relief. Manifestly, there is no reason to consider political remedies where the constitutional claim is that a minority has been subject to arbitrary discrimination; the purpose of constitutional guarantees is to protect minorities against injustices through the political process. One must remember, too, that there will usually be uncertainty whether the victims of any particular discrimination are a majority or minority. Ordinarily it would accomplish little to put the victims to the burden of proving that they are a minority, nor can one ever be sure just why an initiated measure is defeated. These circumstances greatly lessen the value of the initiative and referendum in all ordinary cases, but they do not wholly dispose of the argument here. In the instant case appellees' argument is that the counties in which plaintiffs vote are not the victims of discrimination by a minority through distortion of representative government, or even by a majority, but that they themselves joined in adopting the unequal apportionment by popular consent expressed in a majority vote in each county in the 1962 referendum (see p. 25 above). The

is no redress to the complaining individual because of both the expense and the difficulties of promoting a political movement. See Judge Doyle dissenting (R. 198-199; 219 F. Supp. at 942); *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189, 193 (D. Neb.). The question is, however, whether the individual's right to equal protection in legislative apportionment should be regarded as identical with all other individual constitutional rights. See pp. 26-27 above.

claim may be questionable but, in appraising the desirability of judicial intervention, it would seem relevant that it may be disproved, if untrue, through a relatively straightforward course of political action.

The final factor taken into account should be the character of the plaintiffs' claim, especially whether the right is clear and the wrong is great. Common sense requires greater alacrity in granting equitable relief against a manifest wrong of great magnitude than in a doubtful case of comparatively little injury.

One of the grounds for asserted relief appears to be the claim that the Equal Protection Clause requires seats in both houses of a State legislature to be apportioned as nearly as practicable in proportion to population. The argument would exclude from consideration the claims of geography, history, and established political subdivisions, such as our briefs in the prior cases assumed *arguendo* to be constitutionally permissible considerations. The Government is not prepared to reject the rule of *per capita* equality, but it does not presently urge it. Such an interpretation would press the Equal Protection Clause to an extreme, as applied to State legislative apportionment, would require radical changes in three-quarters of the State governments, and would eliminate the opportunities for local variation. On the other hand, to reject the interpretation at this early stage of the development under *Baker v. Carr*, would prematurely close an important line of constitutional evolution.

If complainants' case depends upon requiring *per capita* apportionment in both houses of a State legislature, the wrong, if any, is not very great. Any gross malapportionment, resulting in more serious injury, can be challenged under the principles laid down in the Government's briefs in prior cases (assuming they are embraced by the Court). Consequently, taking into account all the foregoing factors, the Government would conclude, if the Colorado apportionment were not invalid under the propositions advanced in the prior cases, that the complainants might appropriately be remitted to the political process and any remedies at law.

In the Government's view, however, the plaintiffs have made out a case under the principle that disparities in *per capita* representation may be so gross in relation to any otherwise permissible objectives of the classification as to be arbitrary and capricious under settled constitutional doctrine. The validity of that general proposition will be determined in other pending apportionment cases. Insofar as appellants' challenge to the Colorado apportionment depends upon it, the Court should also determine the merits of the present controversy for however close the case may be on this point as a matter of degree, this challenge breaks no new ground and essentially the same kind of question of degree would have to be decided in determining whether plaintiffs' injury, if any, was sufficient to warrant equitable relief.

THE INEQUALITIES IN PER CAPITA REPRESENTATION IN THE COLORADO LEGISLATURE ARE SO SERIOUS AND THE CONTROLLING MINORITY SO SMALL AS TO DENY APPELLANTS EQUAL PROTECTION OF THE LAWS

The Equal Protection Clause of the Fourteenth Amendment prohibits arbitrary and capricious discrimination among voters in the apportionment of seats in a State legislature. *Baker v. Carr*, 369 U.S. 186; cf. *Gray v. Sanders*, 372 U.S. 368. In its briefs in previous reapportionment cases the Government assumed *arguendo* that the Equal Protection Clause as applied to State apportionment, unlike Article I, Section 2, as applied to Congressional districting,⁹ does not require *per capita* equality. The Government makes the same assumption in the instant case, both because it is satisfied that the apportionment is invalid upon narrower grounds and because, if it is not, the complaint may be dismissed in the exercise of equitable discretion without reaching the question whether *per capita* equality is required. We continue to believe, however, that whatever leeway the Constitution may leave, the only truly fair and democratic method of apportionment is in proportion to population.

Our earlier briefs submitted an analysis of the Equal Protection Clause, consistent with the *arguendo* assumption, that rested upon two principles. First, the basic standard of comparison, in applying the

⁹ See *Wesberry v. Sanders*, No. 42, this Term, decided February 17, 1964.

Equal Protection Clause, is the representation of qualified voters *per capita*. Second, discrimination in the *per capita* representation accorded any group of voters is unconstitutional unless it has a rational basis in objectives relevant to the electoral process. The latter principle is, of course, the traditional rule in all kinds of cases under the Equal Protection Clause, although greater justification is required for discrimination in personal or political rights. See, *e.g.*, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79; *Goesaert v. Cleary*, 335 U.S. 464, 466; *Skinner v. Oklahoma*, 316 U.S. 535, 536, 541; *Yick Wo v. Hopkins*, 118 U.S. 356, 370. Particularizing the latter principle we developed three corollaries:

(a) The Equal Protection Clause is violated by an apportionment that creates gross inequalities in representation without rhyme or reason. The Colorado apportionment survives this test. It is not the kind of crazy-quilt that results from long legislative inaction in the face of drastic shifts in population. *E.g.*, *Baker v. Carr*, 369 U.S. 186. Nor does it involve a current but wholly irrational political compromise based upon power in disregard of reason. *E.g.*, *Maryland Committee for Fair Representation v. Tawes*, No. 29, this Term; *Roman v. Sincock*, No. 307, this Term. Although the Colorado apportionment cannot be rationalized according to any single formula, a combination of intelligible explanations is advanced, which makes it impossible to say that there is no rhyme or reason.

(b) The Equal Protection Clause is violated by a discriminatory apportionment based upon criteria which are contrary to express constitutional limita-

tions, or otherwise invidious, or irrelevant to any permissible objective of legislative apportionment. We distinguished between (1) bases of apportionment which serve the purpose of making representative government work better, even though a collateral consequence may be *per capita* inequalities, and (2) methods of apportionment whose only function is to create classes of voters with political power disproportionate to their number, as by giving farmers more representation than wage earners, city dwellers more than suburbanites, shipping interests more representation than manufacturing communities, or Protestants more than Jews. Some of the latter distinctions are permissible in taxation or regulatory legislation but not, we submit, in respect to political rights. The Fourteenth Amendment guarantees the rich and the poor, the banker and the wage earner, the farmer and the city dweller, like the Catholic and the Protestant, equality before the law defining the opportunities for participation in self-government. For, fuller discussion, see Brief for the United States in *Roman v. Sincock*, No. 307, this Term, pp. 32-43.

The foregoing rule is relevant in the present case but not decisive standing alone. Counsel for appellees, like the draftsmen of Amendment No. 7 and its proponents in the referendum, invoke several justifications which we regard as impermissible, and the district court gave them weight. Thus, we regard as constitutionally irrelevant the entire argument about balancing the political power of the four geographically and economically distinct sections into which the State is divided so as to give the populous

eastern slope communities less representation than their population would warrant. Nor would the possession or lack of natural resources such as water seem to be a justification for weighting the *per capita* vote. Such considerations, unlike the size or historical coherence of a constituency, have nothing to do with the functioning of the legislature as a deliberative, representative body.

But while such considerations do not furnish justification for the *per capita* discrimination in the Colorado legislature, their role in the adoption of the amendment seems indecisive. A court, upon judicial review, will not scrutinize the motives of the legislature. *E.g., Doyle v. Continental Ins. Co.*, 94 U.S. 535; *Arizona v. California*, 283 U.S. 423, 455, and the cases therein cited. The rule would seem even more clearly applicable to measures adopted in a State-wide referendum. If there are proper considerations that might justify the *per capita* inequalities, the Court will not inquire further into motive. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-426.¹⁰ In the present case other permissible objectives are assigned as justification—the importance of county lines, historical as-

¹⁰ In *Gomillion v. Lightfoot*, 364 U.S. 339, the allegations, which were taken as true upon motion to dismiss, compelled the conclusion that the legislation was solely concerned with the racial segregation of voters.

sociations, the need to keep Senate districts compact in area, difficulties of communication, etc. Consequently, although the rule defining permissible objectives is relevant in delimiting the focus, it is not dispositive.

(c) The present case comes down to the question whether the permissible objectives can reasonably be deemed adequate to justify the inequalities in *per capita* representation resulting from Amendment No.

7. Circumstances or objectives that might, under our basic assumption, furnish a reasonable basis for small inequalities are utterly inadequate, even whimsical, when offered as support for grosser discrimination. Accordingly, we turn to the facts of the instant case. We show first that the equal *per capita* representation in Colorado's lower house is not alone enough to satisfy the requirements of equal protection. We then show that the discrimination in *per capita* representation in the Senate, even when weighed against every available justification, is too great to satisfy the requirements of equal protection in a matter so vital as participation in the processes of self-government.

A. THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE APPLY TO BOTH HOUSES OF A BICAMERAL LEGISLATURE

The court below apparently assumed without discussion that the mere fact that seats in the lower house of the Colorado legislature were allocated among the counties in accordance with population did not carry a license to disregard the requirements of the Equal Protection Clause in apportioning seats in the State Senate. That view is plainly correct. The constitutional barrier against arbitrary and capricious discrimination applies to both houses of the legislature

considered together. The weight of authority since *Baker v. Carr* holds that the question whether an apportionment violates the Equal Protection Clause cannot be answered without taking into account both houses of a bicameral legislature. *Sims v. Frink*, 208 F. Supp. 431, 439-440 (M. D. Ala.), pending on appeal *sub nom. Reynolds v. Sims*, Nos. 23, 27, 41, this Term; *Sobel v. Adams*, 208 F. Supp. 316, 323-324 (S.D. Fla.); *Baker v. Carr*, 206 F. Supp. 341 (M. D. Tenn.) (after remand by this Court); *Nolan v. Rhodes*, 218 F. Supp. 953 (S.D. Ohio; *Sweeney v. Notte*, 183 A. 2d 296, 302 (R.I. Sup. Ct.). And arbitrary and capricious discrimination does not become unobjectionable because it affects only one branch of the legislature.

It seems plain, for example, that a *per capita* apportionment of seats in a State House of Representatives would not save a crazy-quilt distribution of seats in the Senate, lacking rhyme or reason and resulting in gross inequalities in *per capita* representation. Similarly, a Senate apportionment that weighted the votes of some citizens, as opposed to others, upon the ground that they were farmers rather than city dwellers, or Catholics rather than Protestants, could not be excused on the ground that the discrimination was not carried into the lower house.

This is not to say that the apportionment of seats in each house must be judged without relation to the other. The ultimate question is whether the complainants have been deprived of equal representation in the legislature without rational justification, and that depends upon their representation in one house as

well as the other. If the seats in one house are apportioned substantially *per capita*, there may be room for greater variation in the other chamber than if the inequalities were found in both houses, provided, of course, that the variation rests upon a rational justification.

In the *amicus* brief filed by New Jersey and a number of other States in *Maryland Committee for Fair Representation v. Tawes*, No. 29, this Term, the argument is advanced that the analogy of the Congress of the United States supports disregard for *per capita* representation in a State Senate if the lower house is apportioned in accordance with population. The federal analogy is inapplicable to the States because it rested upon the historic compromise by which 13 sovereign States agreed to form a federal Union. The composition of the Congress is a compromise between two theories of representation—representation of the sovereign States as equals and representation of the people. The counties in Colorado, as in the other States, are merely governmental subdivisions of the State; they have never been sovereign and independent. The federal analogy is, therefore, as inapplicable to State legislatures as the electoral college is to the election of State officials. See *Gray v. Sanders*, 372 U.S. 368, 378. For a more complete discussion of the inappropriateness of the so-called federal analogy, see Brief for the United States in *Maryland Committee for Fair Representation v. Tawes*, No. 29, this Term, pp. 73–82, and the detailed Appendix to that brief.

The federal analogy would be of no avail to appellees even if it did support the representation of counties, as such, in the upper branch of a State Legislature. The Colorado Senate is not made up of representatives of the counties. Today, as in the past, counties have been grouped into senate districts, and the grouping has been changed from time to time. Some counties are assigned two or more senators chosen from the geographical districts into which the counties are divided. The system bears no resemblance to the federal structure quite apart from the historical and theoretical differences.

In short, the net effect of the equal *per capita* representation in the Colorado House of Representatives is two-fold. First, the inequalities in representation in the Senate are tempered by the equality in the lower branch, a consideration which has undeniable importance where the critical issue is whether the inequalities are so gross as to be arbitrary and capricious in relation to the alleged justification. Second, while the discrimination in the State Senate will enable a minority of the people—in Colorado a minority of possibly less than one-third—to block legislation desired by the majority of the people, the *per capita* representation in the House will prevent a minority from imposing its will upon the majority except as it can force a compromise as the price of action. However, the latter point would seem to have diminishing importance as an argument for appellees in an age of increasing affirmative governmental responsibility for promoting the public welfare.

B. THE DISCRIMINATION IN PER CAPITA REPRESENTATION RESULTING FROM THE GROSS MALAPPORTIONMENT OF THE SENATE HAS NO RATIONAL RELATION TO PERMISSIBLE OBJECTIVES OF LEGISLATIVE APPORTIONMENT

There are undeniably grave inequalities in *per capita* representation in the Colorado Senate. Six districts have more than twice their fair *per capita* share of representation. The 127,520 people of Jefferson County have less than one-third the *per capita* representation of three other senatorial districts (Districts 23, 24, and 34), comprising 12 counties.¹¹ The people of El Paso County, with a population of 143,742, have less than one-third the representation of the people of seven other senatorial districts. The imbalance also prejudices Denver and Pueblo. The following table shows the relationship between the most underrepresented and overrepresented districts together with other typical districts:

¹¹ The computations in this portion of our brief, as elsewhere, are all derived from the basic figures appearing in Appendix C to the opinion of the district court (R. 186-189).

The district numbers are taken from House Bill 65, which implemented Amendment No. 7. They are the same numbers used in the opinion of the district court. The most convenient maps of the senatorial districts are found on the inside of the back and front covers of the separately bound report prepared by the Denver Research Institute, University of Denver, and admitted into evidence as Def. Ex. D. It should be noted, however, that the numbering of the districts on those maps does not correspond to the numbering in House Bill 65. Wherever practicable, therefore, we shall indicate the names of the counties composing a district.

Senatorial district	Total population (1960)	Number of Senators	Population per Senator	Ratio to most underrepresented district
El Paso.....	143,742	2	71,871	1.00
Jefferson.....	127,520	2	63,760	1.13
Denver.....	403,887	8	61,736	1.16
Adams.....	120,296	2	60,148	1.19
Pueblo.....	118,707	2	59,353	1.21
Arapahoe.....	113,426	2	56,713	1.27
Yuma, <i>et al.</i>	36,729	1	36,729	1.96
Otero, Crowley.....	28,106	1	28,106	2.56
Saguache, <i>et al.</i>	24,485	1	24,485	2.94
Fremont, Custer.....	21,501	1	21,501	3.34
Delta, <i>et al.</i>	21,287	1	21,287	3.38
Kit Carson, <i>et al.</i>	21,189	1	21,189	3.39
Chaffee, <i>et al.</i>	20,909	1	20,909	3.44
Las Animas.....	19,983	1	19,983	3.60
State total.....	1,753,947	39	44,973	1.59

The consequence is a striking departure from the democratic principle of majority rule. A numerical majority of the senators may come from counties containing only 33.2 percent of the population—less than one-third of the people.¹² The Eastern Slope Region, with 75 percent of the population, has only 23 out of 39 senators. Denver and the three adjacent counties (Jefferson, Arapahoe, and Adams) have 49 percent of the population but only 14 out of 39 senators—a mere 36 percent. Denver and the three adjacent counties, plus the two other metropolitan areas, Pueblo and Colorado Springs, have 63.7 percent of the State's population but they elect only 18 of the

¹² This figure conflicts with the figure of 36.28 percent given by the majority of the court below (R. 175; 219 F. Supp. at 931). The court arrived at its figure by taking Boulder County out of the Denver Metropolitan Area and adding it to the non-metropolitan areas (R. 175). The figure so obtained, however, does not reflect the smallest number of people capable of electing a majority. The proper figure is the ratio of the number of people in the 20 districts with the lowest population to the total population.

State's 39 senators, less than a majority, although they contain almost two-thirds of the people.

The gross divergencies measured by the 1960 census are widening and will grow still wider. The under-represented districts in the Denver, Colorado Springs, and Pueblo metropolitan areas have continuously gained population (Def. Ex. D, Part II-2). The population of Arapahoe County has jumped from 32,150 in 1940 to 52,125 in 1950 and to 113,426 in 1960. The population of Jefferson County was 30,725 in 1940, 55,687 in 1950, and 127,520 in 1960. El Paso County (the Colorado Springs Metropolitan Area) had 54,025 people in 1940, 74,523 in 1950, and 143,742 in 1960 (*ibid.*). The districts in south central Colorado, which include the most overrepresented district in the State (Las Animas) and which are generally among the most favored, have tended continuously to decline in population in recent years (Def. Ex. D, Part II-1). Las Animas County, for example, had a population of 32,369 in 1940, 25,902 in 1950, and 19,983 in 1960 (*ibid.*).

The trend is obviously progressive—a fact reflected in the population estimates of the Colorado State Planning Division for January 1964. The estimated population of Colorado for that date is 1,950,150. The 20 smallest districts, with a majority of the senators, now have 31.3 percent of the population, as compared with 33.2 percent in 1960. Denver and its suburbs, with just over 50 percent of the population, have 14 senators out of 39. The Denver metropolitan area (which includes Boulder), with well over a majority of the State's population (1,069,000 of 1,950,150) has 16 senators. The six largest coun-

ties, which now have 67 percent of the population (as compared with 63.7 percent in 1960), still have only 18 of the 39 senators.

The *per capita* inequalities, measured by the 1960 census but still growing, are manifestly sufficient to make a *prima facie* case of invidious discrimination even though seats in the lower house of the Colorado legislature are divided in proportion to population.

The court below examined a number of justifications advanced by appellees and found that they furnished a rational basis for the *per capita* discrimination. Others were advanced in the testimony. We may lay to one side at the outset justifications that are invidious or irrelevant. As we have shown in earlier cases, it is not the function of an apportionment to balance off the economic interests of the several regions in a State by assigning them purely arbitrary weight in the legislature disproportionate to the numbers of people affected. The mining, livestock, and agricultural interests are not entitled to extra votes merely because the urban majority would otherwise dominate the legislature.¹³ Nor is it permissible to assign extra voting power to those who command natural resources;¹⁴ a legislature must be made up of representatives of men and women, not of water. Since the underlying principles are thoroughly discussed in our briefs in *Maryland Committee for Fair Representation v. Tawes*, No. 29, this

¹³ See, e.g., affidavit of Edwin C. Johnson (R. 144) ("It is obvious that if both houses of the legislature were on a straight head count basis, the Denver Metropolitan Area would absolutely dominate the State of Colorado").

¹⁴ See, e.g., *id.* (R. 148).

Term, pp. 39-46, and *Roman v. Sincock*, No. 307, this Term, pp. 32-45, we need not repeat them here.

Accordingly, we turn to the justifications assigned that are permissible in kind because their function is to make representative government work better, in the sense of making the legislature better informed, enabling the representatives to be more familiar with their districts and more accessible to their constituents, preserving a measure of stability, or promoting effective political organization, all as distinguished from the mere creation of favored classes of voters with preferred political rights.

Chief among the permissible objectives invoked in the present case is the desire to keep the Senate small enough in numbers to be a truly deliberative body while at the same time making the Senate districts small enough in area to enable each senator to have first-hand knowledge of his entire district and to maintain close contact with his constituents. In a mountainous area—and much of Colorado fits that description—accessibility is affected by the configuration as well as the compactness of a district. A second objective, apparently, was to avoid breaking up any county in order to combine part with another county in forming a multi-county district. County government is important in Colorado (R. 149), and county political organizations doubtless contribute both to a senator's knowledge of the needs and desires of his district and also to the operation of the electoral process as a means of reflecting the will of the electorate. Third, it is a permissible objective of apportionment, which may possibly be rele-

vant in Colorado, to assure some representation of special localities whose needs and problems might pass unnoticed if the districts were drawn solely to achieve *per capita* equality. Nor would we dismiss out of hand the relevance of a purpose to avoid district lines that might submerge the needs and wishes of portions of the electorate by regularly grouping them in districts where they will be outnumbered by voters with wholly different interests. Since districting is a method of giving a voice to putative minorities, community of interest would seem to be a relevant factor in drawing district lines.

Each of these considerations gives some support to a departure from strict *per capita* representation in Colorado but neither singly nor altogether can they make rational disparities of more than 3 to 1 which may give control of the Senate to senators elected by less than a third of the people. This is true for two reasons.

First, the discrimination is not reasonably required to achieve the foregoing objectives. The record makes it apparent that the same objectives could be substantially achieved without creating so much inequality. The most overrepresented district is District 23, Las Animas County, which with one Senator for 19,983 people has more than twice the proper ratio. Two other districts in the South Central Region, District 30 (consisting of Huerfano, Costilla, and Alamosa Counties) and District 31 (consisting of Saguache, Mineral, Rio Grande, and Conejos Counties) also have twice their proper representation. One representative could be freed by abolishing Dis-

trict 30 and putting Huerfano County in District 23 with Las Animas, to which it is already linked in a single Judicial District, and by putting Alamosa and Costilla Counties in District 31. District 23 would still cover only 6,378 square miles in relatively open country. District 31 would cover 8,202 square miles but would be by no means the largest district in the State. Furthermore, District 14 is now split by a mountain range crossed by only one highway, whereas the allocation of Huerfano County to District 23 on the east side of the range and of Alamosa and Costilla Counties to District 31 to the west of the range would allocate each to an area to which it is linked by the highway system. The population of each of the enlarged districts would still be well below the ratio. One seat would be freed to allocate to El Paso County, the most underrepresented in the State, which could then have three senators instead of two, each of whom would still represent slightly more than the ideal ratio.

A second seat could be freed by combining Districts 24¹⁵ and 25,¹⁶ both of which are already grossly over-represented. Combined, their population would still be less than the ideal ratio. The area of the combined district would be 7,461 square miles, possibly somewhat larger than ideal but not appreciably out of line with other Colorado districts. District 29 in the northwest corner of Colorado embraces 13,853 square miles and District 34 in the eastern region embraces 10,194

¹⁵ District 24 consists of Chaffee, Park, Gilpin, Clear Creek, Douglas, and Teller Counties.

¹⁶ District 25 is composed of Fremont and Custer Counties.

square miles. Communication in the combined district would be easier than in many mountainous regions for most of it is a high plateau with roads running north and south as well as east and west. Both of the existing districts are classified by appellees as belonging to the western region. They obviously share many common characteristics. The Senate seat freed by the combination could be assigned to Denver County, thus giving its citizens nine senators for 493,887 people, much closer to the ideal ratio of one senator for 45,000 people.

These two slight changes, which sacrifice none of the alleged objectives save the invidious purpose to downgrade metropolitan voters, would substantially lessen the discrimination. The ratio between the most over-represented district and the most underrepresented would then be reduced from 3.6 to 1 to 3 to 1.¹⁷ It would take almost two-fifths instead of less than one-third of the people to elect a majority of the Senate.

The conclusion that serious discrimination is hardly necessary to achieve the objectives of following county lines while keeping the Senate small in numbers and the districts convenient in size can also be demonstrated by examining still another alternative. We have set forth in Appendix B an illustrative apportionment which does not subdivide any county and creates no district with an area as great as 10,000 square miles, but which eliminates so much of the

¹⁷ District 34 (consisting of Kit Carson, Cheyenne, Lincoln, Kiowa, and Elbert Counties) would become the most overrepresented district and Districts 21 and 22 the most underrepresented.

existing discrimination that it would take ~~at least~~ 45 percent of the population to elect a numerical majority of the Senate and all of the districts except one would have at least three-fourths of the ideal ratio. Senatorial districts with an area of less than 10,000 square miles cannot be judged excessively large even by Colorado's own standards. The largest existing district is District 29, which has an area of 13,853 square miles, and District 34 covers 10,194 square miles. The illustration contains no district as large as these. In addition to reducing the inequalities to the point where the smallest statistical majority of the State Senate would be chosen by ~~almost~~ 45 percent of the people, the illustration would also eliminate all ratios of overrepresentation to underrepresentation in excess of 1.7 to 1 (excepting one district that could not be enlarged without covering a very large area). It would give the three metropolitan areas (Greater Denver, including Boulder, Colorado Springs, and El Paso), which contain 67.9 percent of the population, 64.1 percent instead of only 51.3 percent of the Senate seats.

We recognize that it is not for the courts to choose one apportionment as preferable to another either because it provides greater *per capita* equality or because it approaches closer to some other ideal. Once the requirements of equal protection are satisfied, the choice is for the legislature. We cite possible revisions merely to show that there is no rational relationship between the discrimination resulting from the present apportionment and the only relevant legisla-

tive purposes cited to sustain it. Minor differences will not justify gross discrimination in a matter so fundamental as legislative representation. Inequality of *per capita* representation cannot be justified even by a permissible objective of legislative apportionment if the objective can be satisfied without sacrificing the principle of *per capita* equality. See Brief for the United States in *Maryland Committee for Fair Representation v. Tawes*, No. 29, this Term, pp. 41-42. By the same token, a permissible objective which can be satisfied by a small departure from *per capita* equality does not furnish a reasonable basis for a larger inequality. Conversely, the larger departure, even allowing room for legislative judgment, cannot be termed rational in terms of the objective advanced, for it would be a classification of people in a way that unnecessarily abridges the value of the right to vote. *Wesberry v. Sanders*, No. 22, this Term, decided February 17, 1964. The illustrations given above show that the departure goes beyond anything reasonably necessary to accomplish constitutional purposes in the present case.

A second independently sufficient reason for reversing the judgment below is that it attaches excessive weight to geographical considerations and the supposed desirability of following county lines, and too little value to the principles of equality and majority rule. Both the proponents of the current apportionment and the court below were heavily influenced, as we have seen (pp. 45-46, above), by such invidious con-

siderations as the desire to weight representation in favor of rural areas and to balance economic interests, not to mention the evident political purpose of preserving all the seats of incumbent senators. While such motives do not invalidate the apportionment if the discrimination is not otherwise arbitrary and capricious, they do show that both the appellees' argument and the district court's determination that the plan was "rational" resulted largely from their use of constitutionally irrelevant factors rather than their "arbitrariness" in striking the balance. When the invidious and irrelevant considerations are stripped away and only constitutionally permissible functions of apportionment are weighed in the balance, it becomes evident that the discrimination is arbitrary and capricious.

The geographical size of districts is far less important today, even in a large State like Colorado, than earlier in our history. Automobiles and modern highways make it possible to cover a district in much less time than even a generation ago. More roads are kept open in winter. Television, radio, and other methods of mass communication enable the representative to reach his constituents with relative ease; they gather and disseminate information that formerly could be acquired only by word of mouth. It helps to put the problem of area in perspective, therefore, to recall that as long ago as 1909 Colorado had one senatorial district covering 12,336 square miles and two others covering 11,063 and 9,232 square miles, respectively. And under the 1876 apportionment, Colorado had three Senate districts larger than any of

those at present; they covered 17,534, 15,803, and 15,461 square miles, respectively.

The inferences to be drawn from the size of Colorado's judicial districts also temper the force of the arguments based upon size and accessibility. Some are as large or larger than any senatorial district, although served by only one or two judges. They cover areas on both sides of mountain ranges, including in one instance the continental divide. See 1953 Colo. Rev. Stat. 37-3-2 to 37-3-17. Obviously, Colorado does not consider mountains and mountain barriers as crucial in establishing governmental units; today they are seldom serious barriers to effective communications.

The importance of county boundaries has also been exaggerated. For many years Colorado repeatedly changed the boundary lines, adding and subtracting large areas. See Hafen, *The Counties of Colorado: A History of Their Creation and the Origin of Their Names*, VIII The Colorado Magazine (March 1931), pp. 48-60. Still more important, the gross discrimination in *per capita* representation could be eliminated without attaching part of any county to an area in any other county to form a single district (see pp. 47-50 above).

The court below also gave weight to the fact that the current senate districts conform to "prior representation districts" (R. 176-177). This is but a way of noting what might be described more bluntly as a decision not to abolish the seat of any incumbent senator even at the cost of serious *per capita* discrimination. A senate district does not have independent

political or historical significance, apart from the fact that it is the geographical area from which senators previously have been chosen. While the abrupt revision of established district lines might be a relevant consideration all other things being equal, it can be given no substantial significance without accepting any discrimination that has previously existed. The shortcomings of the past cannot be the measure of current constitutional responsibilities. History may sometimes explain gross disparities in representation between the senatorial districts; it can never justify them. See the dissenting opinion of Judge Doyle below (R. 198; 219 F. Supp. at 942); *Butterworth v. Dempsey*, D. Conn., Civil Action No. 9571, decided February 10, 1964, slip op., p. 17 ("the equal protection clause is not concerned with desires to perpetuate * * * historical anomalies"); *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga.).¹³

The court below, like appellees here, also gave too little weight to the basic right to an equal voice in

¹³ The intervenors attempted to show at the trial that there were a large number of transients in populated areas such as El Paso County, where the Air Force Academy, Fort Carson, Ent Air Force Base, and NORAD are located (R. 633) and Denver, which is the site of the State government, Lowry Air Force Base, and a large number of federal installations and defense plants (R. 634). Testimony also was adduced to the effect that the population of the county of Boulder was illusory because the census included the student population of Boulder, some 12,000 to 13,000 out of a total of 72,254 (R. 654). An exhibit introduced by the intervenors contained a tabulation of the registered voters and total population of each county of the State (Intervenors' Ex. D). This table showed that El Paso County had 56,501 registered voters out of a total population of 143,742, or approximately 39.3 percent,

representative government. The decisions of this Court make it clear that strong justification is re-

compared with the State-wide average of 50.1 percent (*ibid.*).

The theory that Amendment No. 7 was designed to take into account the transient population of certain of the larger areas does not stand up under examination. First, military personnel, government employees, and students are not included within the categories of people disabled from voting in Colorado. 1953 Colo. Rev. Stat. 49-3-3. Although "[f]or the purpose of voting * * * no person shall be deemed to have gained a residence by reason of his presence * * * while in the civil or military service of the state, or of the United States, nor while a student at any institution of learning * * *" (Colo. Const., Art. VII, Sec. 4; 1953 Colo. Rev. Stat. 49-3-4), there was no evidence as to how many soldiers, students, or employees were, and how many were not, residents of the various counties and therefore entitled to vote there for that reason (R. 637).

Second, if the apportionment were based on the number of registered voters, Denver would have received more—not less—than its fair representation based on population. For notwithstanding its alleged "transient" population, the percentage of its population who were registered voters was 52 percent, exceeding the State-wide average of 50.1 percent (Intervenors' Ex. D).

Third, despite Boulder's allegedly "transient" student population, it was overrepresented, having two senators for a total population of 74,254 (inclusive of transients). The justification asserted was to provide for the fact that the population of Boulder was "greatly increasing." The population of Boulder County increased 55 percent from 1950 to 1960 (Def. Ex. D, Part II-2). Under the theory of the intervenors, this increase offset the transient nature of its student population, but much more startling rates of increase, such as Adams' 199 percent and Jefferson's 127 percent, were for some reason insufficient to justify an allowance for future growth.

Fourth, exclusion of the so-called transient population from the total population of the various districts will not explain the discrimination against the suburban counties of Adams, Arapahoe, and Jefferson. For all these reasons, the compelling inference is that the apportionment was not based on comparisons of total population less transients.

quired for any legislative classification affecting fundamental rights. See Brief for the United States in *Maryland Committee for Fair Representation v. Tawes*, No. 29, this Term, pp. 65-71. And voting "is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, No. 23, this Term, decided February 17, 1964, slip op., pp. 16-17.

The question (upon our basic assumption) is inescapably one of degree. Colorado assigns some valid functions to the classification which gives citizens in some counties greater *per capita* representation than citizens in others, but objectives that might furnish acceptable justification for one variation become so relatively insignificant as to leave the discrimination arbitrary and capricious when the inequalities are gross and wholly submerge the principle of majority rule. That was plainly the case in the Maryland litigation where the disparities ran as high as 6 to 1 in the House and 32 to 1 in the Senate and the two chambers could be controlled by numerical majorities chosen from districts containing only 36 percent and 14 percent of the people. See Brief for the United State in *Maryland Committee for Fair Representation v. Tawes*, No. 29, this Term, pp. 57-59.

It was plainly the case also in the Alabama litigation where, under the so-called "67-Senator Amendment," a numerical majority of the House could come from districts containing 42.4 percent of the people while the Senate could be controlled by senators from districts containing less than 20 percent of the people. See Brief for the United States in *Reynolds v. Sims*, Nos. 23, 27, 41, this Term, pp. 20, 32. The apportionment in Delaware was still more discriminatory. See Brief for the United States in *Roman v. Sincock*, No. 307, this Term, pp. 15-16, 24-36. In New York the constitutional provisions concerning apportionment as applied to the 1960 census will permit a numerical majority of the House to be chosen by counties containing 37 percent of the population, and a numerical majority of the Senate to be elected by counties containing 38 percent of the people. See Brief for the United States in *WMCA, Inc. v. Simon*, No. 20, this Term, pp. 34-35.

Judged by this standard the present case is much closer than those which preceded it. The Colorado House, unlike the lower branch in any of the other cases, is apportioned among the counties as nearly as practicable in accordance with population. The Senate cannot be controlled by senators elected by less than 33.2 percent of the people—a much better ratio than in Maryland, Alabama, or Delaware even if one looks only to the Senate, and better than New York if both branches are taken into account. Affirmance here would not require approval of those apportionments, even apart from the other attacks

upon their validity;¹⁰ nor would it cast doubt upon the basic principles we have advanced, for, accepting the principles, the outcome here still turns, as we have said, upon a question of degree.

While the question is admittedly close; the United States submits that three points should be decisive:

(1) The discrimination is sufficiently substantial to give 75 percent of the voters, living in the eastern slope region, less than half the *per capita* representation in the Colorado Senate which it grants the 25 percent of the voters living in other regions, and permits counties containing less than one-third of the people to elect a numerical majority of the Senate.

(2) The trend of population growth is constantly increasing the discrimination.

(3) The only relevant and non-invidious objectives could be substantially achieved without serious discrimination.

¹⁰ The New York, Maryland, Delaware, and Virginia apportionments are also attacked upon grounds not applicable to the present case. The same is true of some aspects of the apportionments in the Alabama cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court should be reversed.

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MARCH 1964.

APPENDIX A

INITIATED AMENDMENT NO. 7

1962 COLO. GEN. ELECTION

SECTION 1. Sections 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47 and 48 of Article V are adopted to read as follows:

"Section 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All districts shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

"Section 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

"Section 47. SENATE. The State shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams, Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

"Section 48. REVISION OF DISTRICTS.

At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Sections 45, 46 and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and representatives and the senatorial and representative districts of the general assembly shall be as provided by law."

INITIATED AMENDMENT NO. 8 (REJECTED BY THE VOTERS)

1962 COLO. GEN. ELECTION

Sections 45 and 47, Article V, of the Constitution of the State of Colorado, are hereby amended to read as follows:

"Section 45. APPORTIONMENT BY COMMISSION. (A) There shall be established a Commission for Legislative Apportionment composed of three members who shall be qualified electors of the State of Colorado, no more than two of whom shall be of the same political party, to serve for a term of eighteen months from the time of their appointment. One member shall be appointed by each of the following in this order: by the Attorney General prior to

June 1, by the Lieutenant Governor prior to June 15 and by the State Board of Education prior to July 1, of each year of appointment. The appointments shall be made prior to July 1, 1963, July 1, 1971, and July 1 of each tenth year thereafter.

“(B) It shall be the duty of the commission to delineate senatorial and representative districts and to revise and adjust the apportionment of senators and representatives among such districts. The commission shall certify to the Colorado Supreme Court the boundaries of the senatorial and representative districts and the reapportionment of senators and representatives on or before January 2, 1964; January 2, 1972, and January 2 of each tenth year thereafter.

“(C) If such delineation and apportionment conforms to the requirements of sections 45 through 47 of this article, the court shall affirm the same. If such delineation and apportionment does not conform to the said requirements or if for any reason whatever the same is not certified to the court, then the court shall delineate senatorial and representative districts and adjust the apportionment among such districts. The court shall rule on or before April 15 of each year set forth in paragraph (B) of this section, with such districting and apportionment to become effective on the date of the court's ruling. The court shall notify forthwith the secretary of state and the clerk of each county of its ruling.

“(D) The commission shall determine a strict population ratio for the senate and for the house by dividing the total state population as set forth in each decennial United States Census by the number of seats assigned to the senate and house, respectively. No legislative district shall contain a population per senator or representative of $33\frac{1}{3}\%$ more or less than the strict population ratio, except mountainous senatorial dis-

tricts of more than 5,500 square miles, where the major portion of the district lies west of the 28th meridian of longitude west from Washington, D.C., but no such senatorial district shall contain a population of less than 50% of the strict population ratio.

“(E) It is the intent that sparsely populated areas shall have maximum representation within the limits set forth in paragraph (D) and that population per legislator in densely populated areas shall be as nearly equal as possible.

“(Section 47. SENATORIAL AND REPRESENTATIVE DISTRICTS. (A) Senatorial districts may consist of one county or two or more contiguous counties but no county shall be divided in the formation of a senatorial district.

“(B) Representative districts may consist of one county or two or more contiguous counties, except that any county which is apportioned two or more representatives may be divided into representative subdistricts; Provided, that, a majority of the voters of that county approve in a general election the exact method of subdivision and the exact apportionment of representatives among the subdistricts and the county at large.

“(C) Any proposal to divide a county into subdistricts shall be placed on the ballot only by initiative petition filed with the secretary of state according to the requirements set forth for statewide initiated measures in Article V, Section 1, of this constitution and statutes enacted thereunder; Provided, that, the requirements for the number of signatures and publication shall be determined for that county instead of for the state.

“(D) Subdistricting measures may be placed on the ballot at the general elections of 1966, 1974, and at the general elections held each tenth year thereafter and at no other times.

Any such measure shall take effect pursuant to the provisions of Article V, Section 1, of this constitution and shall remain in effect until repealed or revised by the people through another initiated measure, except that when the apportionment of representatives to any subdistricted county is increased or decreased by the commission for legislative apportionment, the commission may, subject to the review provided in Section 45, paragraph (C), of this article, amend the subdistricting in said county as necessary to conform to the new apportionment.

“(E) A candidate for representative in any subdistricted county need not reside in the subdistrict in which he is a candidate.

“(F) No part of any county may be combined with another county or part of another county in the formation of any senatorial or representative district.”

Prior to the adoption of Amendment No. 7, 1953 Colo. Rev. Stat. 63-1-3, provided:

Senatorial districts.—The state of Colorado shall be divided into twenty-five senatorial districts, numbered and entitled to the number of senators, as follows:

The city and county of Denver shall constitute the first senatorial district and be entitled to eight senators.

The county of Pueblo shall constitute the second senatorial district and be entitled to two senators.

The county of El Paso shall constitute the third senatorial district and be entitled to two senators.

The county of Las Animas shall constitute the fourth senatorial district and be entitled to one senator.

The county of Boulder shall constitute the fifth senatorial district and be entitled to one senator.

The counties of Chaffee, Park, Gilpin, Clear Creek, Douglas and Teller shall constitute the sixth senatorial district and be entitled to one senator.

The county of Weld shall constitute the seventh senatorial district and be entitled to two senators.

The county of Jefferson shall constitute the eighth senatorial district and be entitled to one senator.

The counties of Fremont and Custer shall constitute the ninth senatorial district and be entitled to one senator.

The county of Larimer shall constitute the tenth senatorial district and be entitled to one senator.

The counties of Delta, Gunnison and Hinsdale shall constitute the eleventh senatorial district and be entitled to one senator.

The counties of Logan, Sedgwick and Phillips shall constitute the twelfth senatorial district and be entitled to one senator.

The counties of Rio Blanco, Moffat, Routt, Jackson and Grand shall constitute the thirteenth senatorial district and be entitled to one senator.

The counties of Huerfano, Costilla and Alamosa shall constitute the fourteenth senatorial district and be entitled to one senator.

The counties of Saguache, Mineral, Rio Grande and Conejos shall constitute the fifteenth senatorial district and be entitled to one senator.

The county of Mesa shall constitute the sixteenth senatorial district and be entitled to one senator.

The counties of Montrose, Ouray, San Miguel and Dolores shall constitute the seventeenth senatorial district and be entitled to one senator.

The counties of Kit Carson, Cheyenne, Lincoln and Kiowa shall constitute the eighteenth senatorial district and be entitled to one senator.

The counties of San Juan, Montezuma, La Plata and Archuleta shall constitute the nineteenth senatorial district and be entitled to one senator.

The counties of Yuma, Washington and Morgan shall constitute the twentieth senatorial district and be entitled to one senator.

The counties of Garfield, Summit, Eagle, Lake and Pitkin shall constitute the twenty-first senatorial district and be entitled to one senator.

The counties of Arapahoe and Elbert shall constitute the twenty-second senatorial district and be entitled to one senator.

The counties of Otero and Crowley shall constitute the twenty-third senatorial district and be entitled to one senator.

The county of Adams shall constitute the twenty-fourth senatorial district and be entitled to one senator.

The counties of Bent, Prowers and Baca shall constitute the twenty-fifth senatorial district and be entitled to one senator.

APPENDIX B

ALTERNATIVE APPORTIONMENT

District	Counties	Senators	Size (square miles)	Population
1	Rio Blanco..... Moffat..... Routt..... Jackson..... Grand.....	1	13,833	23,426
2	Pitkin..... Lake..... Garfield..... Eagle..... Chaffee.....	1	7,085	34,474
3	Gilpin..... Clear Creek..... Park..... Fremont..... Teller..... Douglas..... Custer..... Summit.....	1	7,087	26,125
4	Mea.....	1	3,334	50,715
5	Hinsdale..... Gunnison..... Delta..... Montrose..... Ouray.....	1	8,246	39,671
6	San Miguel..... Montezuma..... San Juan..... La Plata..... Archuleta.....	1	7,837	41,907
7	Saguache..... Mineral..... Rio Grande..... Alamosa..... Concepcion..... Costilla..... Huerfano.....	1	9,782	40,571
8	Las Animas..... Prowers..... Brewer.....	1	8,900	30,590

See footnote at end of table.

District	Counties	Senators	Size (square miles)	Population
9	Bent..... Otero..... Crowley..... Kiowa..... Cheyenne..... Kit Carson.....	1	9,368	47,696
10	Morgan..... Washington..... Elbert..... Lincoln.....	1	8,387	37,335
11	Logan..... Sedgwick..... Phillips..... Yuma.....	1	5,466	37,896
12-13	Weld.....	2	4,033	72,344
14	Larimer.....	1	2,840	53,943
15-16	Boulder.....	2	738	74,354
17-18	Adams.....	2	1,200	130,296
19-20	Denver.....	11	73	463,887
30-31	Arapahoe.....	2	815	113,426
32-34	Jefferson.....	3	791	127,620
35-37	El Paso.....	3	2,189	142,742
38-39	Pueblo.....	2	2,414	118,707

¹ It is possible that Chaffee would not be considered readily accessible in a district composed otherwise of Pitkin, Lake, Garfield, and Eagle Counties. If this is correct, Summit should be transferred to district 2 and Chaffee moved to district 3. The disadvantage of this exchange is that district 3 would then have a population of almost 45,000, while district 2 would have only approximately 37,000 people instead of 37,000 and 34,000, respectively. This change, however, would not affect the fact that a majority of the legislature would be elected by districts with 45 percent of the people.

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IN THE
Supreme Court of the United States

NO. 526 OCTOBER TERM, 1960

ANDRES NUCAS AND ARCHIE L. LISCO,

Appellants

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF
THE STATE OF COLORADO, JOHN LOVE, AS GOV-
ERNOR OF THE STATE OF COLORADO, ET AL,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO

RESPONSE OF APPELLEES
TO BRIEF OF AMICUS CURIAE

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IN THE
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ANDRES LUCAS AND ARCHIE L. LISCO,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO

**RESPONSE OF APPELLEES
TO BRIEF OF AMICUS CURIAE**

INTRODUCTION

All of the Appellees (Defendants and Intervenor below) join in this response to the Brief of the Solicitor General as Amicus Curiae.

At the outset we wish to acknowledge the sincere effort of the Solicitor General on behalf of the Government toward a statesmanlike approach to the difficult problems here involved. The Amicus brief obviously strives to meet the responsibility of the Government as Amicus Curiae to present its view of the case. In this spirit the

Brief of the Solicitor General has stated with commendable fairness some of the principles which should govern. We must firmly disagree, however, with its application of these principles to this case and particularly with its failure to penetrate to the core of the case. While recognizing that this case is unique in its concern with the initiative and a vote of the people (as well as other factors), the brief of the Amicus, like that of the Appellants, fails to grasp the absolutely determinative nature of this factor.¹

SUMMARY OF ARGUMENT

I

Acknowledging the Government's fair enunciation of many applicable principles, it is not chauvinism to assert their misapplication to the Colorado plan. The evaluation of this case requires more knowledge of and a deeper penetration into the diverse character of Colorado and the diverse personal concerns which require a voice in the state's legislature.

II

The issue is only the apportionment of the state senate. The lower house is strictly apportioned on population. In apportioning the senate many factors were considered. The Government admits that this is not a "crazy quilt" apportionment and that there is a uniqueness which bespeaks special consideration.

The Government, recognizing the ready availability of initiative, in effect invites dismissal of this appeal on account of this clearly adequate remedy. We could not agree more completely. Despite this clear avenue for avoiding the constitutional issue, the Government then inconsistently attempts to upset the Colorado plan as a violation of the Equal Protection Clause.

¹See below pp. 24-27.

III

Acknowledging that there are permissible objectives for deviation from strict population apportionment of one house of a bicameral legislature, the Government enunciates standards which, we submit, sustain the Colorado plan. The nub of the Government's conclusion that the Colorado plan should be struck down is a mere quibble.

The Government looks upon the Colorado plan as a balancing of the economic interests of mining, livestock, agriculture and natural resources against urban people. We agree that interests, as such, should not be balanced against people and we agree with the Government's assertion that "a legislature must be made up of representatives of men and women, not of water."

It is the people concerned in these economic spheres who are represented. The well being of these people depends upon the resolution of many legislative matters; questions for instance relating to water, grazing lands, the branding of cattle, highway taxes, the control of grasshoppers and wind damage, drought relief, county revenues to compensate for the tax exemption of public lands, recreational facilities and tourism, state parks and wild life management.

These questions are real ones and their resolution affects people. Legislation concerning them requires knowledgeable lawmakers versed in the problems of their constituents and able to give them meaningful representation.

IV

The Government in advocating the rejection of the Colorado plan has, in important areas, either made baseless, erroneous assumptions or has misapprehended the facts.

First, there is the assertion that an objective of the Colorado plan is "to weight representation in favor of

rural areas." This was not an objective of the plan. The objective was to grant meaningful representation to the people in the diverse areas of concern by apportioning the senate with that permissible objective in mind. Secondly, the Government asserts that an invidious consideration behind the Colorado plan was "the evident political purpose of preserving all of the seats of incumbent senators." That this is clearly erroneous is demonstrated by the fact that the plan was initiated by the people, not by the legislature, and that it will in fact cause a number of members of both houses of both parties to lose their seats.

Finally, the Government attempts to belittle the importance of distance, climate and topography by the purely gratuitous assumption of the availability of improved transportation facilities and mass communication media which simply are not available.

V.

The Government admits that its condemnation of the Colorado plan is a matter of degree. Its condemnation is based solely upon an irrelevant play on numbers as to the Colorado senate—admitting the propriety of the house apportionment.

The assertion of the Government that a 33.2% minority can impose its will in the senate requires such a coincidence of improbables that it is without real foundation. In playing the "numbers game" in another instance, the government asserts that "75 percent of the voters, living in the eastern slope region [has] less than half the *per capita* representation in the Colorado senate [as] . . . 25 percent of the voters living in other regions." This implies that 25% has a virtual veto. This is clearly and demonstrably wrong because the Eastern Slope has 69% of the members of the house and 59% of the senators.

The implication of bloc voting inherent in both assertions totally ignores the realities of the legislative process,

where there is accommodation and balancing, avoidance of extremes and compromise.

After a discussion of what it considers irrational disparities in the Colorado plan, the Government proposes one which it claims would be permissible. This proposal is a real revelation. It involves only the shifting of two senators and the merging of those senators' prior districts with other districts. The shifting raises difficulties of access and would mean representation by one senator of people with divergent economic interests. The real significance of this plan is its assumption that a shift of two out of 104 members of the Colorado General Assembly would render an unconstitutional plan constitutional. It calls for the application of the old maxim, *de minimis non curat lex*.

VI

Finally, we come to the heart of this case—the integrity of the vote. The Government has become so preoccupied with the mechanics of apportionment that it would have this Court violate that integrity by overturning a majority vote of the Colorado electorate, both at large and in each county, adopting the Colorado plan of apportionment. The Government's rationalization for advancing this suggestion is that the significance of the popular vote was "... clouded by cross-currents stirred by other consequences of the particular measure upon which the vote was held." (Br. p. 15) Is the will of the voters so lightly to be frustrated?

Whoever would invite such intervention, to reverse the voters' choice, strikes at the very heart and core of representative government. Such an invitation would apply just as logically to any election where it could be claimed that the issue was clouded by "cross-currents". These "cross-currents", or imponderables always obtain—they are mutable, but the choice of the people in fair elections must be immutable.

ARGUMENT

I. THE COLORADO CASE IS UNIQUE.

In our principal briefs we demonstrated the factual uniqueness of the Colorado plan of apportionment, not only from the other state legislative reapportionment cases argued this term but from any other case or factual situation of which we have knowledge. Not only does the Colorado reapportionment have a reasonable and rational basis, but it was adopted overwhelmingly by the citizens of Colorado in the 1962 election, carried every county of the state and can be readily changed by the voters whenever they choose. The Government acknowledges this uniqueness in its brief:

"The instant case . . . presents a unique circumstance, not found in any other case coming to our attention, which argues more strongly for invoking the doctrine that equity may stay its hand when the public interest requires, leaving the complainants to any other available remedies." (Br. pp. 24-25)

"In the present case, . . . appellees are able to make a unique plea for withholding equitable intervention." (Br. p. 16)

II. THE PRINCIPLES OF EQUITY ENUNCIATED BY THE GOVERNMENT DEMONSTRATE THAT THE FEDERAL COURTS SHOULD NOT INTERVENE IN THIS CASE.

The Amicus brief begins (Br. p. 22) with a discussion of equitable principles which is very similar to that contained in the principal briefs of Appellees. The Government recognizes the discretionary nature of the relief sought here. It notes that (1) the Colorado apportionment is a current one "adopted after prolonged consideration" (Br. p. 25); (2) it "is not a case in which the problems of fair representation have been neglected or the channels for expressing the popular will have been closed"

(Br. p. 25); (3) the Colorado plan was "favored by the voters of every geographical unit, including those alleged to be the victims of unconstitutional discrimination" (Br. p. 27); (4) in Colorado the "avenue [of initiative and referendum] for expressing the majority's will seems readily available both in theory and through familiar use" (Br. p. 30); (5) the lower house is apportioned on a strictly per capita basis of population (Br. p. 38); and (6) "the question is admittedly close." (Br. p. 58) The Government also declines to argue, as Appellants do, that strict *per capita* representation is required.² (Br. p. 32)

Yet, after conceding all of the foregoing and stating that if the Colorado plan meets the standards set forth by the Government in the other five reapportionment cases "the Court might wish to dismiss . . . [Appellants'] challenge without deciding its merits" (Br. p. 17), the Government does an about face. It attempts to find a "gross discrimination" by the application of purely arithmetical ratios and percentages having no meaningful relationship either to real people and their welfare and aspirations or to real legislative problems or procedures. It plays a "numbers game." It forgets the equities, available remedies, and vote of the people previously noted, and in a complete *non sequitur* based only on arithmetic asks the Court to reverse the lower court.

Looking at the opposing briefs as a whole, it is apparent (1) that only Appellants urge a need for judicial resolution of the problems of Colorado apportionment, and (2) the Government itself would be content to have this appeal dismissed. With the latter we agree. The case

²It should be noted that even Appellants, who are arguing for strict *per capita* representation, admit in footnotes in their proposed plan (Br. Appendix C) that this is virtually impossible in Colorado. Thus, they say: "... it is almost impossible to make all districts precisely equal . . ." (p. 93) "There is no other existing district with which it appears geographically possible to combine Boulder." (p. 93) "Thus some judgment must be exercised . . ." (p. 94) "... resolution of the fractional factor in favor of an additional member for this County would appear justified." (p. 95)

should be dismissed under the established and sound principle that a court of equity should not intervene and that it should withhold the exercise of its powers when a better remedy exists for the problem at hand.

The case arose out of an attack upon the decision by vote of the people of Colorado, fully informed and faced with clear alternatives. If time proves that decision to be wrong, or if time alters the facts so as to outmode that decision, the people of Colorado should be the ones to change it, and they have at hand the readily available means of doing so. In Colorado, the people and not the legislature have true ultimate sovereignty and only they can amend the Colorado Constitution. (There is no provision in Colorado for amendment of the Constitution by the legislature—only by the people, by vote on a measure either initiated by the people or referred to them by the legislature. (Colo. Const., Art. XIX)) To do as the Government suggests and judicially determine the Colorado plan invalid, suggesting some other alternative, would have the ultimate, if not technical effect, of a mandamus to the people of Colorado to change their plan of representative government. This plan was adopted by a recent popular vote and can at any time hereafter be changed to conform to the voters' needs and desires, should those needs and desires change. This is no place for a court of equity to be exercising its functions.

III. AN APPLICATION OF EVEN THE PRINCIPLES ACCEPTED BY THE GOVERNMENT DEMONSTRATES THE VALIDITY OF THE COLORADO PLAN.

While the broad principles of equal protection have developed through years of judicial interpretation, the application of these principles to legislative reapportionment is new. With no specific guiding case law to follow, we are, in all sincerity, generally content with the *ex cathedra* enunciation by the Solicitor General of the standards

by which a legislative reapportionment is to be judged. These standards are delineated in the Amicus brief as follows:

"... [W]e turn to the justifications assigned that are permissible in kind because their function is to make representative government work better, in the sense of making the legislature better informed, enabling the representatives to be more familiar with their districts and more accessible to their constituents, preserving a measure of stability, or promoting effective political organization, all as distinguished from the mere creation of favored classes of voters with preferred political rights." (Br. p. 46)

The Government then enumerates specific "permissible objectives" which give "some support to a departure from strict *per capita* representation in Colorado . . ." (Br. p. 47) They are: (1) "the desire to keep the Senate small enough in numbers to be a truly deliberative body"; (2) "making the Senate districts small enough in area to enable each senator to have first-hand knowledge of his entire district and to maintain close contact with his constituents", particularly in "a mountainous area" like Colorado where "accessibility is affected by the configuration as well as the compactness of a district"; (3) "to avoid breaking up any county in order to combine part with another county in forming a multi-county district"; (4) recognizing the importance of "county political organizations [which] doubtless contribute both to a senator's knowledge of the needs and desires of his district and also to the operation of the electoral process as a means of reflecting the will of the electorate"; (5) "to assure some representation of special localities whose needs and problems might pass unnoticed if the districts were drawn solely to achieve *per capita* equality"; (6) "to avoid district lines that might submerge the needs and wishes of portions of the electorate by regularly grouping them in districts where they will be outnumbered by voters with wholly different

interests"; (7) "[s]ince districting is a method of giving a voice to putative minorities, community of interest would seem to be a relevant factor in drawing district lines." (Br. pp. 46-47.)

The Government also agrees that the Colorado plan, when measured against the proposition that discrimination in *per capita* representation must have "a rational basis in objectives relevant to the electoral process", (1) is not a "crazy quilt" without rhyme or reason, and (2) cannot be condemned for failure to have permissible objectives to justify it. (Br. pp. 35-38)

The Government position, in the light of the above concessions, then boils down to the extent or degree of deviation from *per capita* representation that may be justified by Colorado's permissible objectives. Even on this matter of degree, however, the Government states:

"We recognize that it is not for the courts to choose one apportionment as preferable to another because it provides greater *per capita* equality or because it approaches closer to some other ideal." (Br. p. 50)

As we will show, the Government errs in its subsequent analysis of the Colorado plan, first by erroneously ascribing nonexistent motives and purposes to the Colorado plan and, second, by placing slavish reliance on numbers, ratios and percentages, which though they be arithmetically correct are meaningless in the context of true representative government in Colorado. A real analysis of the Colorado plan makes it apparent that, despite arithmetical variations, Colorado's districting is sound and reasonable. Thus, James Grafton Rogers said in his testimony:

"The distribution of the Senate under Amendment No. 7 appears to me to be the product of a complex of historical, economic, social, and not many political,

elements, but it is a complex of them all. Certainly, it does not represent a distribution of the Senate on the basis of an International Business Machine product." (App. p. 109)

Similarly, what separates the permissible from impermissible considerations in view of the Solicitor General devolves to a quibble in semantics. Thus, the Government first challenges the concept of representation of economic interests. It states:

"[I]t is not the function of an apportionment to balance off the economic interests of the several regions in a State by assigning them purely arbitrary weight in the legislature disproportionate to the numbers of people affected. The mining, livestock, and agricultural interests are not entitled to extra votes merely because the urban majority would otherwise dominate the legislature. Nor is it permissible to assign extra voting power to those who command natural resources; *a legislature must be made up of representatives of men and women, not of water.*" (Emphasis supplied) (Br. p. 45)

We agree. Legislators represent people, not faceless numbers drawn from a census; they represent people, not per capita statistics; they represent people with interests, problems, homes and aspirations; people with jobs (or unemployed if jobs are lacking); people who need education and roads; people whose livelihood in mining areas depends on minerals and mines; people whose very life in arid Colorado depends on water;³ people who pay for their government by taxes and who differ as to what kind

³"Here is a land where life is written in water."

These are the first words of an inscription underlying the murals in the rotunda of the Colorado State Capitol Building. "The use, control, and development of our streams is of ever-present importance to Colorado. Water is the basis, the measure, and the limit of our economy, our growth, and our general welfare." Breitenstein, "Some Elements of Colorado Water Law," 22 ROCKY MTN. L. REV. 343, 355 (June 1950)

of taxes they want. It is absurd to say that a Colorado State Senator should not represent water. Of course he should not. But the welfare of all of the people in arid Colorado depends on water, and that of some depends on mining, livestock or agriculture, just as that of others is dependent on the manufacture or sale of machinery and of others on the practice of law or medicine.

In Colorado, some of these people are in the minority. There can be economic minorities, as there are other minorities, and they too are entitled to some representation. The well-being of these people, whether minority or majority, depends in part on the intelligent resolution of specific legislative problems. These would include:

(1) How may water be diverted from its streambed, appropriated to beneficial use and such diversion and appropriation recorded and proved? How can a water conservancy district be established? What provisions of a proposed interstate river water compact are consonant with the needs of Colorado citizens living in the river's drainage area or other drainage areas to which its water could be diverted? What compensatory water storage should be made available to those living in one river basin when water is diverted to another? How can cities, towns and factories be prevented from polluting the state's natural rivers? What standards will govern the development, priority and use of underground water non-tributary to any stream?

(2) What rental should be charged for leases of state and school lands for grazing purposes? What effect on cattle rustling would result from laws prohibiting the branding of cattle by hot irons? What is a fair tax assessment per head of cattle or sheep?

(3) What highway tax should apply to trucks carrying farm produce? What grasshopper and wind damage control measures are necessary? What should be the re-

quirements for grading and candling eggs in Colorado? Is drought relief necessary for a given area?

(4) Because of the high percentage of public lands and the resulting low tax base in the Western Region, what can be done to pay for the costs of its county governments? How to encourage fishermen, skiers, mountain climbers, wilderness outfitters and ordinary tourists and promote the recreational values of this "last frontier" and still retain its wilderness qualities. Should more funds be devoted to developing state parks? Can farmer demands for predator control be reconciled with proper wild life management?

These questions are not hypothetical, as is shown by the nature of typical matters passed upon by the Colorado legislature in its last general session.⁴ They are real and their resolution affects the lives of people. Moreover, their meaningful resolution by the Colorado legislature requires

⁴ In 1963 the General Assembly passed some 321 bills. They related to numerous subjects, including the following:

Water (4 bills, relating to the Costilla Creek Compact between Colorado and New Mexico, repeal of provisions for public irrigation districts, and appropriations for snow studies and studies of the outlet works of the Reudi Dam);

Cattle and Agriculture (15 bills, relating to publication of registered brands and lists of estrays, the authority of brand inspectors to ride the ranges to protect against theft, brand inspections of cattle purchased by meat packers, predatory animal control programs, and inspection and control of parasites of honey bees);

Fish, Game and Recreation (17 bills, relating to appropriation of waters for the preservation of fish life, the tagging of big game, classification of fur bearing animals, disposition of funds from the sale of beaver pelts taken by state employees, regulation of the possession and sale of raptors, and appropriations for fish hatcheries);

Local Government (36 bills, 11 relating to cities and towns, 6 to counties, and 19 to special improvement districts, which provide services of an urban nature (water, sewers, parks, etc.) to unincorporated areas). These bills related to reimbursement of counties for certain welfare expenditures, additional authority relating to county airports, refunding of bonded debts of cities and towns, authority for weed and rubbish removal by cities and towns, temporary assignment of policemen or firemen from one jurisdiction to another in emergencies, and annexation of territory by municipalities (which was vetoed by the Governor).

knowledgeable lawmakers, versed in the needs and problems of their constituents and able to propose, draft and intelligently consider legislation in areas that would otherwise "pass unnoticed" were their particular constituents not so represented.

Therefore, regardless of characterizations such as "mining interests" or "water interests", what we are talking about, as were the witnesses below, and what the Colorado plan is all about is people; people, not arbitrarily favored or discriminated against, but people with dissimilar and sometimes conflicting needs and problems.

IV. OTHER ASSUMPTIONS MADE BY THE GOVERNMENT HAVE NO BASIS IN FACT.

As we have shown above, the charged "invidious consideration" of representing economic "interests" asserted by the Government against the Colorado plan does not bear up under analysis. Similar assertions without factual basis have been made by the Government. We turn to them briefly.

First, the Government asserts that an objective of the Colorado plan is "to weight representation in favor of rural areas" (Br. p. 52) The import of this assertion is that the rural districts were deliberately accorded more representatives than their population alone would entitle them to simply because they were rural. This is not so. We do not and could not assert an inherent superiority of farmers versus city dwellers, of irrigators versus dry-land farmers or of rural versus urban dwellers. But we do insist that in a bicameral legislature, where one house is apportioned strictly in accordance with population, the other house can provide for the representation of people with interests as closely in common with each other as is possible. Thus their interests will not be submerged by the representatives of people whose interests vary from theirs or are antagonistic. We do assert the right of the people in apportion-

ing their legislature to recognize factors essential to their welfare. Even so, in the Colorado Senate 24 senators out of 39 are to be elected from predominantly urban districts. (Br. of Defendant-Appellees, p. 40)

Second, the Government asserts that an "invidious consideration" behind the Colorado plan was "the evident political purpose of preserving all of the seats of incumbent senators." (Br. pp. 51-52) This surmise is apparently based upon the fact that the Colorado senatorial district lines run primarily along previously existing district lines. That there is nothing "invidious" about this particular fact is evident from the following: (1) The most natural and logical way to draw district lines is in accordance with those in existence which, with minor exceptions, were those adopted in 1932 on the initiative of the Colorado voters. This accords with the experience of Colorado voters, both as to reasonable boundaries and voting habits. (2) The Colorado plan, by apportioning the House of Representatives on a strict population basis, obviously will cause a number of representatives of both parties to lose their seats. This will result not only from the subdistricting of the more populous counties, but also from the redesignation of the boundaries of multi-county districts. The exact effect of this redistricting of the house strictly in accordance with population could not, of course, be foretold, but it would necessarily result in the loss of many seats by incumbents.⁵ (3) The Colorado plan, by providing for subdistricting of

⁵Under the Colorado plan, as implemented by House Bill 65, ten incumbents will no longer serve in the House of Representatives because their legislative districts have been combined with other districts. Certain of the less populous counties formerly allocated a total of nineteen representatives now are allocated only nine representatives. (Of the nineteen incumbents, twelve are Republicans and seven are Democrats.)

In addition, in larger counties which have more than one representative district, the district boundaries established by House Bill 65 result in nine incumbents facing the loss of their seats to other incumbents, simply because they live in common districts. As of the time of approval of House Bill 65, twelve incumbents in Denver were living in five districts and two in Mesa County were living in the same district, as were two in Pueblo. Of these sixteen incumbents, living in seven districts, seven were Republican and nine were Democratic. (Source: Legislative Reference Office)

the more populous senate districts, threatened the seat of every senator from a multi-senator district." (4) Finally, the Colorado legislature and its senators did not propose the Colorado plan. The Intervenor did, and it was adopted by the voters of Colorado.⁷

From the foregoing, it is apparent that the alleged "invidious considerations" which the Government asserts lay behind the Colorado apportionment have no basis in fact.

Finally, the Government attempts to shrug off the importance of distances, climate and topography by gratuitously assuming the availability of improved transpor-

⁶In the Senate, seven incumbents live in three districts, as boundaries were established in House Bill 65. Of those, five are in Denver and two are in Pueblo. Three of the incumbents, all from Denver, are Republicans, four are Democrats. Four will be unable to be reelected unless they or their opponents move. (Source: Legislative Reference Office)

⁷We would like to put at rest once and for all the implication in both the Appellants' and the Government's briefs that the Colorado plan (Amendment No. 7) was "politically motivated." Neither the Democratic nor the Republican State Platforms in 1962 took any position with respect to the two reapportionment plans. In fact, the Democratic platform did not even mention the subject. The Republican platform said only:

"Recognizing the transcendent importance of reapportionment under direct mandate of the people, we pledge ourselves to make reapportionment the first order of business in keeping with the constitutional requirement."

The 1960 Democratic platform contained an interesting, short reference to apportionment:

"The 1960 Federal census having been completed we urge the prompt and effective reapportionment of legislative seats as provided by the constitution in order to insure that all sections of the state are properly represented."

And, in 1958:

"We reaffirm our support of continuing efforts to apportion the Colorado General Assembly to assure people of all areas and interests of their voice in legislative halls.

"We urge a bi-partisan legislative study of the problem, or the reactivation of the Governor's Commission on Legislative Apportionment, in order that a solution be found that is equitable to the city and rural dweller alike."

These platforms are significant documents. Although they are not public records, Section 49-4-25, Colorado Revised Statutes 1953 provided for the formulation of the state platforms of the respective parties on the fourth Tuesday of September in election years. The statute also required that the platforms be made public not later than five days after the date of such meeting. (See *The Denver Post*, Oct. 7, 1962, p. 6D.)

tation facilities and of mass communication media.⁸ In the winter, no road in Colorado is dependable: Loveland Pass, the most heavily traveled pass in Colorado (Exhibit D., Part II, p. 62), is often closed by avalanches and blizzards. The same is true of Berthoud, Monarch and La Veta Passes, the major arterial highways over the Continental Divide. Many "highways" that are designated as "improved" on a map are neither paved nor open throughout the year. The first snow falls of winter are allowed to close them by drifts and no effort is made by the Highway Department to open them until late spring or early summer. Moreover, television and radio communication is inadequate, and even nonexistent, in many parts of the western half of the state. The resort town of Aspen, for example, catering to its modern, sophisticated clientele, did not have a radio station until February, 1964, and reception from the nearest town, Glenwood Springs, was ordinarily impossible. Even where local radio stations exist, the topography limits their effective range to approximately 15 miles. This means that a Western Slope senator cannot through one communication outlet reach all of his constituents. The situation with television broadcasting is even more restrictive. For example, in the northwest corner of the state near Meeker, the only television reception originates in Utah; in the San Luis Valley and in the southwest near Cortez and Durango the only television is that beamed from Albuquerque, New Mexico; and a resident of Jackson County and other northern Colorado areas can receive television only from Cheyenne, Wyoming. A state senator from these areas is thus already required to go to another state to appeal via television to his constituents. Any increase in the area of his district would, of course, multiply the difficulties of communication. In short, the problems of transportation and communication

⁸This assumption is not supported by any fact appearing in the record and is contrary to the situation as it obtains in Colorado. This leaves Appellees no alternative but to rebut these unsupported assertions by themselves going beyond the record.

In Colorado simply cannot be shrugged off as no longer existing in modern times.⁹

It is apparent that the Government has taken arguments and facts from other cases and has attempted to shoehorn them into this Colorado case. Those arguments and facts simply do not fit.

V. THE NUMERICAL INEQUALITIES IN THE COLORADO SENATE ARE MEANINGLESS IN TERMS BOTH OF EQUAL PROTECTION AND THE LEGISLATIVE PROCESS.

The crux of the Government's case, by its own admission, "is inescapably . . . [a question] of degree." (Br. p. 56) Principally, the Government relies upon the mathematical statistics: (1) that a ratio of 3.6 to 1 exists between the smallest district (Las Animas County) and the largest district (El Paso County)¹⁰ and (2) that a theoretical minority of 33.2% of the population can elect a majority of the Colorado senators. As we have demonstrated in our principal briefs, such ratios and percentages are by themselves meaningless.¹¹

⁹At another point (Br. p. 52) the Government purports to put "the problem of area in perspective" by noting that certain former senate districts covered large areas. In 1876, for example, District 13 covered 15,803 square miles, but it should also be noted that according to the 1870 census only 828 people lived in this entire area.

¹⁰The numbering of senatorial districts varies between Amendment 7 (the apportionment plan adopted by the voters) and the Lamb Bill (Colorado House Bill 65) which implements Amendment 7 and gives each subdistrict within a multisensor district a separate number. Thus, multisensor Denver (District 1 under Amendment 7) is broken down into districts 1 through 8 under House Bill 65.

The court below, this brief and the briefs of the United States and Appellee-Defendants refer to the districts as they are numbered under House Bill 65.

The principal brief of Appellee-Intervenors and the Denver Research Institute Report (Defendant's Exhibit D) employ the district numbers used in Amendment 7. A parallel table of the two numbering systems is appended for the convenience of the Court as Appendix A to this brief.

¹¹Brief of Appellee-Defendants, pp. 35-42; Brief of Appellee-Intervenors, pp. 25-27, 34-37.

To begin with, we must not lose sight of the fact that the lower house of Colorado's bicameral legislature is apportioned strictly according to population. The Government has conceded that the net effect of such equal *per capita* representation in the house is two-fold: First, because "the inequalities in representation in the Senate are tempered by the equality in the lower branch, a consideration which has undeniable importance where the critical issue is whether the inequalities are so gross as to be arbitrary and capricious in relation to the alleged justification. Second, [because] . . . the *per capita* representation in the House will prevent a minority from imposing its will upon the majority except as it can force a compromise as the price of action." (Br. p. 41)

Even within the senate, where the alleged discrimination exists, the ratios and percentages harped upon by the Government are not relevant in terms of the legislative process and of fair representative government which, after all, are basically what this case is about. In order for the 33.2% minority to impose its will in the senate as to a given legislative issue, the following assumptions must be made: (1) The issue must be such that all of the senators residing outside the state's three metropolitan areas¹² must, disregarding party lines and other differences and conflicting representational interests dividing them, vote to a man as a bloc. (2) The issue must be such that one senator from the metropolitan areas, specifically one of the two senators from Boulder County (and from no other), will break away and vote with the non-metropolitan areas. (3) The issue must be such as to galvanize the remaining 19 senators in the metropolitan areas into a single bloc from which not one, regardless of party affiliation or any other reason, will deviate. It is wholly naive and unrealistic in terms of the legislative process to assume that such

¹²Denver, Colorado Springs and Pueblo. Together they elect a majority (20) of the 39 senators.

an issue could arise. The percentage, therefore, upon which the Government stakes its case is meaningless.¹³

To provide another illustration of the failure of the Government to come to grips with the fundamental issue of the case (that of what constitutes fair and reasonable legislative apportionment under the Equal Protection Clause), consider the twice-repeated phrase (Br. pp. 19 and 58) that the Colorado plan gives "75 percent of the voters, living in the eastern slope region, less than half the *per capita* representation in the Colorado Senate which it grants the 25 percent of the voters living in other regions" Its implication is that these 25 percent of the voters have virtually a veto over the Colorado legislative process. Let us analyze the proposition.

The "Eastern Slope" counties as defined by Exhibit D are comprised of the three metropolitan areas of Denver (Denver, Adams, Arapahoe, Jefferson and Boulder Counties), Colorado Springs (El Paso County) and Pueblo (Pueblo County) plus the counties of Weld and Larimer. The Eastern Slope elects approximately 69% of the representatives in Colorado's lower house and 23 (59%) of Colorado's 39 senators. Even assuming that representatives

¹³Without urging at this point the federal analogy, a comparable argument could be made that voters from states representing 17.1% of the total United States population could, by electing 51 U. S. Senators, impose their will on Congress. The 26 least populous states, with a combined population of 30,728,381 are:

Alaska	Kansas	Oklahoma
Arizona	Maine	Oregon
Arkansas	Mississippi	Rhode Island
Colorado	Montana	South Carolina
Connecticut	Nebraska	South Dakota
Delaware	Nevada	Utah
Hawaii	New Hampshire	Vermont
Idaho	New Mexico	West Virginia
	North Dakota	Wyoming

Is there any conceivable issue which could so divide the Senate that all of the senators from the 25 least populous states and one of the senators from Connecticut, the next least populous state, would vote as a bloc against all of the senators from all of the other states and against the other senator from Connecticut who would also all vote as a bloc? This type of reasoning *per force* lies behind attaching any real significance to the fact that a majority of the Colorado senate is elected from districts having 33.2% of the Colorado population.

of the 25% of the people living outside the Eastern Slope could unite on an issue, what more control of both houses does the Eastern Slope need? A simple majority of both houses is all that is needed to pass all legislation in Colorado. (Const., Art. V, Sec. 22) The Eastern Slope would have 3 votes more than a majority in the Senate, and 14 votes¹⁴ more than a majority in the House.

If we exclude Weld and Larimer Counties, which although containing relatively large cities are still rural in large part, still the remainder of the Eastern Slope (the metropolitan areas of Denver, Colorado Springs and Pueblo with their suburbs) has a majority of the Senators, 20, and 42 out of 65 representatives. This is more than would be necessary to carry legislation.

We would not be so naive or unrealistic as to leave the impression that all the Eastern Slope or the metropolitan senators would unite or vote as a bloc on any really controversial issue. Their votes are also subject to cross-currents of party politics and the varying needs and interests of their local constituents. This is exactly the point. The legislative process is, per force, one of accommodation and of balancing. The legislative process is not one of head-on collision. It is a process of avoiding extremes, give and take, and compromise. It is not one of mathematics.

The Court therefore should eschew this "numbers game" played first by Appellants and now by the Government, because ratios and percentages so used do not provide meaningful criteria for the ultimate decision to be made here — whether equal protection of the laws has been denied Colorado voters. The Government itself has provided an excellent example of this point. After discussing various permissible justifications for a deviation from strict representation by population, the Government asserts that

¹⁴House Bill 65.

the Colorado plan may be remedied by either of two alternatives for redistricting the Colorado Senate. (Br. pp. 47-49). The first of these involves only the shifting of two senators, one to Denver and one to El Paso County, and the merging of those senators' prior districts with other districts.

In terms of apportionment, we cannot say that this first alternative for apportionment proposed by the Solicitor General is irrational. Indeed, it varies little from the Colorado plan. It does, however, raise difficulties such as the following. The proposal to add Custer and Fremont Counties to District 24 (Chaffee, Park, Gilpin, Clear Creek, Douglas and Teller Counties) would add to the transportation and fragmented population problems of a district where access and divergence of population are already a problem. (Exhibit D, Part I, pp. 24-25) It would throw Canon City with its high percentage of employment in state government (Exhibit D, Part I, p. 26) and the rest of Fremont County with its unemployed coal miners in with mountain counties having little state employment, no substantial cities, and no coal mining; in short, with wholly dissimilar characteristics. It would create a district 140 air miles long from north to south and 215 miles long by the shortest road mileage. (The roads are undependable and in some places unpaved.) It would add to the population of a district which includes Clear Creek County which is rapidly becoming part of suburban Denver.¹⁵ (Exhibit D, Part I, pp. 24-25)

The other suggestion, to cut down the number of senators representing the South Central Region, would further

¹⁵It is predicted by the Clear Creek County Area Redevelopment Administration Committee that the population of Clear Creek will increase from its 1960 level of 2,793 to from 20,000 to 30,000 in the next decade. The growth prediction primarily derives its support from the construction of Interstate Highway 70 running west from Denver.

detract from effective representation of its chronically depressed counties.¹⁶

Be that as it may, the absurdity of the mathematical approach to equal protection is illustrated by the fact that the Government, by shifting two out of thirty-nine senators (less than 2% of the membership of the 104 man General Assembly), purports to render valid what it previously described as a "gross malapportionment" (Br. p. 42) in violation of the Equal Protection Clause. The incongruity of the position so taken becomes apparent when the Government's first proposed plan of apportionment is subjected to the "numbers game" approach employed, by Appellants and the Government, against the Colorado plan. Under the Government plan just discussed a minority of 39% of the people¹⁷ would elect a majority of the Colorado Senate. The ratio between the largest district under the Government plan (Jefferson County) and the smallest district (Number 34, Kit Carson, Elbert, Lincoln, Cheyenne and Kiowa) is 3 to 1 and between the largest and the next smallest district (Number 27, Delta, Gunnison and Hinsdale) 2.99 to 1. Indeed, four districts (Numbers 34, 27, 29 and 33) would have over two and one-half times the representation of Jefferson County. What possible rational basis is there for asserting that a ratio of 3.6 to 1 is "gross" and 3 to 1 is permissible, or that majority senate representa-

¹⁶Figures developed by the Colorado Public Welfare Department show a state average of the percent of population receiving assistance of 5.29%. The very counties whose representation the Solicitor General would propose to cut are those which head the list, beginning with Huerfano County where 18.06% of the population receive welfare assistance. Other counties which would lose representation and their respective percentages are: Costilla, 15.37%; Las Animas, 14.09%; Conejos, 14.01%; Saguache, 13.87%; Custer, 10.12%; Rio Grande, 9.93%; Fremont, 9.49%; and Mineral, 8.64%. El Paso and Denver, on the other hand, to which the Solicitor General's proposal would give more seats, have a definitely lower percentage of population receiving state aid, namely 3.46% and 6.32%, respectively. It is submitted that the welfare problems of these chronically depressed counties are entitled to fair and adequate representation.

¹⁷684,283 people from the Western Region, South Central Region and Eastern Region and from Weld, Boulder, Larimer and El Paso Counties.

tion for 33.2% of the population is invidious discrimination and for 39% is not? How can it be logically asserted that a shift of 2 out of 104 members of the Colorado General Assembly (65 of whom are elected on a strict population basis) renders an allegedly unconstitutional plan constitutional?

The second alternative suggested by the Government for reapportioning the legislature appears as Appendix B to the Amicus brief. This is a more extreme plan which also contains serious defects by creating unnatural and unreasonable districts. Rather than belabor the matter here, we have analyzed the plan and shown certain of its defects in Appendix B to this brief. We submit that in spite of its disclaimers the Government has, in suggesting the alternate plans of apportionment, lost sight of its own caveat:

"Once the requirements of equal protection are satisfied, the choice is for the legislature [and, in Colorado, *a fortiori* for the people]." (Br. p. 50)

This brings us to the bedrock question that must be asked regarding the position of the Government here. Why, when the Government recognizes the discretionary aspects of equitable relief, when the permissible criteria for apportionment articulated by the Government go hand in glove with the objectives of the Colorado plan and when at least one of the proposed Government solutions to Colorado apportionment is so close to the Colorado plan as to render the differences *de minimis*, is the United States here seeking a reversal in this case? To us the Government's arguments do not support its conclusion.

VI. TO GIVE EFFECT TO THE GOVERNMENT'S CONTENTION WOULD MAKE THE RIGHT TO VOTE AN EMPTY GESTURE.

The core of this case is the vote of the people: (1) Their approval of the Colorado plan in 1962; (2) Their right to

initiate a change in the plan any time they wish; (3) Their right to have the integrity of their vote preserved. The Government in this case has become so engrossed in its mathematics of apportioning votes that it has lost sight of preserving the integrity of a vote cast. This case arises from a challenge to the right of a clearly identified majority—a majority of the voters in every county of the State of Colorado—to adopt a plan of apportionment of their own choosing.

The Government charges the lower court with giving “too little [weight] to the *value of the right to vote*.” (Br. p. 19. ¹⁸Emphasis added.) It then turns around and disdains and disregards the vote cast by the people of Colorado. It exalts the value of the right¹⁸ and then asks the Court to render that right sterile by overturning the vote of the Colorado electorate.

The Government argues that “the significance of the vote [was] clouded by cross-currents stirred by other consequences of the particular measure upon which the vote was held.” (Br. p. 15) There were obviously in the referendum other issues than just the constituency of the state senate.

(a) There was the issue of whether the state legislature should be forced to reapportion the house after every decennial census by terminating the compensation of the legislators and making them ineligible for reelection if they failed to do so.

(b) There was the issue of whether, if one house is apportioned strictly in accordance with population,

¹⁸At page 56 of its brief the Government states very eloquently:

“... [v]oting ‘is regarded as a fundamental political right, because preservative of all rights.’ *Yick Wo v. Hopkins*, 118 U.S. 356, 370. ‘No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.’ *Wesberry v. Sanders*, No. 23, this Term, decided February 17, 1964. . . .”

the apportionment of the other house may take into consideration other factors (Amendment No. 7) or must also be apportioned strictly on population (Amendment No. 8).¹⁹

(c) There was the issue of subdistricting of counties having more than one representative or senator.

(d) There was the issue as to whether apportionment of the house should be made by the legislature, which had failed in the past to follow the mandate of the Constitution, or should be made by a commission.

What effect any of these other issues had upon the ultimate vote is, of course, purely a matter for speculation. But is the integrity of votes cast to be attacked on the ground that there were cross-currents operating for and against the adoption of the Colorado plan?

Every election has its cross-currents and its imponderables. What would have been the results in the presidential election in 1956 had not the British and French invaded Suez and stimulated the vigorous reaction of President Eisenhower? What would have been the result in the election in 1962 had it not been for the Cuban missile crisis and President Kennedy's dramatic stand? What caused the victory of Ambassador Lodge over Senator Goldwater and Governor Rockefeller in the New Hampshire primaries this year? Should we disregard an election in New York when a blizzard ravages the upstate area, leaving voters in metropolitan New York relatively accessible to the polls? The answer, of course, is no. A vote in the United States of America is a sacred thing and its integrity must be respected.

The only purpose of the intervention of the federal courts in these apportionment cases is to protect the right to vote against invidious discrimination. But to what pur-

¹⁹In the 1962 election 305,700 voted for Amendment No. 7, over twice as many as the 149,822 who voted for Amendment No. 8.

pose protect the right to vote if the vote itself is ignored? This is the core, the very heart, of the Colorado case. As the lower court succinctly put it: "The contention that the voters have discriminated against themselves appalls rather than convinces." (App. p. 254).

When anyone contends that the vote of the people should be ignored because they are ignorant, misled or confused, that person is shaking the very cornerstone of the American form of government. An election is a real, vital, tough part of the American way of life. Both sides campaign energetically and vigorously, using all media of communication. As long as the fight is fair and everyone has equal access to the polls (as in this case, where the vote was state-wide and a ballot in Durango equalled one in Denver) we must abide by the result if the guarantee of representative government is to mean a thing. In Colorado, if the loser feels aggrieved, he can try again, as Appellants can here.²⁰ To say, as the Government and Appellants do, that the right to vote is sacred but that the vote itself can be ignored, appalls.

²⁰Appellants still have until July 2, 1964, to file an initiative petition with the Secretary of State in order to place an amendment on the ballot. (§70-1-4, Colo. Rev. Stat. 1953)

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A

PARALLEL TABLE OF DISTRICTS

The numbering of districts as in Amendment No. 7 is used in the principal brief of Appellee-Intervenors and in Exhibit D. The numbering of districts as in H.B. 65 (the Lamb Bill) is used in the opinion of the court below, in this brief and in the briefs of Appellee-Defendants and the United States.

<u>Amendment No. 7</u>	<u>H.B. 65</u>	<u>Counties</u>
1	1- 8	Denver
2	9-10	Pueblo
3	11-12	El Paso
4	23	Las Animas
5	13-14	Boulder
6	24	Chaffee Park Gilpin Clear Creek Douglas Teller
7	15-16	Weld
8	21-22	Jefferson
9	25	Fremont Custer
10	26	Larimer
11	27	Delta Gunnison Hinsdale
12	28	Logan Sedgwick Phillips
13	29	Rio Blanco Moffat Routt Jackson Grand

30

Amendment No. 7.H.B. 65Counties

14

30

Huerfano
Costilla
Alamosa

15

31

Saguache
Mineral
Rio Grande
Conejos

16

32

Mesa

17

33

Montrose
Ouray
San Miguel
Dolores

18

34

Kit Carson
Cheyenne
Lincoln
Kiowa
Elbert

19

35

San Juan
Montezuma
La Plata
Archuleta

20

36

Yuma
Washington
Morgan

21

37

Garfield
Summit
Eagle
Lake
Pitkin

22

17-18

Arapahoe

23

38

Otero
Crowley

24

19-20

Adams

25

39

Bent
Prowers
Baca

APPENDIX B

ANALYSIS OF THE ALTERNATIVE APPORTIONMENT OF THE COLORADO SENATE PROPOSED BY THE SOLICITOR GENERAL

A brief look at the alternate apportionment suggested in the Appendix B¹ to the brief of the United States points up the dangers of reapportioning a state such as Colorado with a map and a census report, at a distance of over a thousand miles. In analyzing the difficulties encountered in the Government's second proposal, we do not mean to suggest that the districts provided by the Colorado plan are perfect or that the Government's proposals are completely irrational. In a state with a topography, economy and people as diverse as Colorado's, one can only hope to achieve a reasonable balancing of conflicting goals, as the Colorado plan has done. This appendix, in pointing out the shortcomings of the Government's second proposal, is not intended to belittle the job done by the United States. It rather serves to point up how the Colorado plan has overcome as many of the obstacles as is reasonably possible in apportioning the state.

The United States admits the difficulties encountered in drawing a line between Amicus' Districts 2 and 3, when it confesses ignorance of the accessibility of Chaffee County to the rest of Amicus' District 2. While U. S. Highway 24 provides a year-round connection (over 10,424 foot Tennessee Pass) between Chaffee County in the Southeast and Garfield County in the West, it should be noted that the towns of Salida (in the southeastern part of the district)

¹In this analysis we will refer to the apportionment proposed in Appendix B to the brief of the United States as the Government's second proposal to distinguish it from the proposal incorporated in its brief (pp. 47-49), and to the districts suggested as "Amicus' District 1, 2, 3," etc.

and Rifle² (in the western part) are 178 miles apart over U. S. 24, and that Rifle is still approximately 50 miles from the western limits of the district. A knowledge of the country would reveal that Colorado Highway 82, over Independence Pass, a shorter route by the map, is closed almost half the year. It is beset, as is Highway 24, by a most formidable range of mountains, the Sawatch, which contains more than 14 peaks over 14,000 feet in height,³ more than are found in all of California, which has only 12.³

Chaffee County is far more easily accessible to Amicus' District 3, over a relatively low pass, and should be shifted to that district, as the footnote to the Government's second proposal nearly concedes. (Br. p. 69) This shift would be accompanied by a shift of Summit County out of Amicus' District 3 and into Amicus' District 2, which would then become identical to District 37 under the Colorado plan. Including Summit County in Amicus' District 3 makes no geographical sense because it is separated from the rest of that district by a high range of mountains constituting part of the Continental Divide (obviously placing it in a different river basin).

These shifts do not end the catalogue of difficulties in Amicus' District 3. The two southernmost counties, Fremont and Custer, have little in common with the rest of the district. The main highway through this area is U. S. 50, which runs east and west between Pueblo and Gunnison, but District 5 runs north and south. Contrast the situation of these southern counties with that of Gilpin and Clear Creek Counties to the north, which are rapidly becoming more highly developed and urbanized than they have been since the early mining days. For example, Clear Creek County, with a 1960 population of 2,793 (Exhibit D,

²Colorado Year Book, 1939-1961, p. 450.

³World Almanac, 1964, p. 599.

Part II, p. 3), anticipates having a population of between 20,000 and 30,000 in the next decade.⁴

In Amicus' District 5 and 6 we see another example of the difficulties of attempting to draw district lines without a thorough knowledge of the state.⁵ The San Juan Mountains,⁶ perhaps the most rugged in the United States outside of Alaska, cut off direct access between Hinsdale and Ouray counties in Amicus' District 5,⁷ while they similarly isolate San Juan County from Dolores and San Miguel Counties in Amicus' District 6.⁸ It should also be noted that San Miguel and Dolores Counties are in the Dolores River Basin, while the remainder of Amicus' District 6 is in the San Juan River Basin. (Exhibit D, Part II, p. 52) In the water-conscious west, where water is a vital commodity and struggles often occur between residents of different drainage systems, such districting is unreasonable.⁹ This plan could well mean that lightly populated

⁴Master Plan, Clear Creek County (1963), pp. 2, 7, by Clear Creek County Area Redevelopment Administration Committee, issued November 18, 1963, (after the preparation of Exhibit D). This increase is anticipated because of three factors (1) the construction of Interstate Highway 70, west from Denver, opening Clear Creek County for suburban development; (2) establishment by the Public Service Co. of Colorado of the largest hydroelectric plant in Colorado above Georgetown; and (3) opening of a new large molybdenum mine by the Climax Molybdenum Company southwest of Berthoud Pass.

⁵We assume the Government intended to place Dolores County in Amicus' District 6, rather than omit it altogether from any district.

⁶Eleven peaks in this overall range exceed 14,000 feet in elevation. Colorado Year Book, 1959-61, p. 450.

⁷To get from Lake City, in Hinsdale County, to Ouray, in Ouray County, a distance of approximately 20 air miles, it is necessary to travel 138 miles, part of it over unpaved roads.

⁸While Silverton and Telluride, the county seats of San Juan and San Miguel Counties, respectively, are less than 15 air miles apart, they are actually 71 road miles apart via the shortest route, which involves traveling north through Ouray County, in another district. The shortest route through the district is 166 miles.

⁹Under Amicus' second proposal it is entirely possible that no senator would feel impelled to speak up for the residents of the Dolores River Basin, because the rest of the basin, lying in thinly populated western Montrose County, would be overwhelmed by the voters in the rest of Amicus' District 5, which lies in the Gunnison River Basin.

San Miguel and Dolores Counties would be ignored by their senator in the event a conflict ever developed between the two basins.¹⁰

Amicus' District 7 sprawls over nearly 10,000 square miles of south central Colorado, encompassing the sparsely populated mountain country of Saguache County and the more urban areas of Alamosa County. The contrasts between Saguache, Mineral, Rio Grande and Conejos Counties (District 31 under the Colorado plan) on the one hand, and Alamosa, Costilla and Huerfano Counties (District 30 under the Colorado plan), on the other, are rather striking. For example, over one-half of the acreage in Saguache, Mineral, Rio Grande and Conejos Counties is in national forests, while in the other three counties, only 7.4% of the land is so used. (Exhibit D, Part II, p. 34) These latter three counties are over one-half urban, with a density of 6.3 persons per square mile, while the other four counties are predominantly rural, with a density of 3.9 persons per square mile (Exhibit D, Part II, p. 1). These figures only begin to indicate the vast differences between the sparsely populated, mountainous counties in the west of the district, and the more urban counties situated in the east.

Amicus' District 8 is another example of what can happen when an area is redistricted without a clear understanding of the unique characteristics of its various parts. Las Animas County is a depressed area because of the current decline in coal mining, with an unemployment rate of 9.1% in 1960. It is largely dependent on coal mining, timber and, to a lesser extent, on livestock grazing. (Exhibit D, Part I, pp. 38-39) Baca County, on the other hand, represented the hardest-hit portion of the great "dust bowl" of the 1930's, and has been gradually recovering, to

¹⁰The bulk of the population in this Amicus District 6 live in the cities of Durango and Cortez, in La Plata and Montezuma counties, in the San Juan Basin.


the point where its unemployment rate was below 4% in 1960. (Exhibit D, Part II, p. 21) The people in Baca and Prowers Counties are more heavily dependent on winter wheat, have some possibilities of oil and have no interest in coal and timber.

While the topographical difficulties are lessened in the Great Plains area, districting still presents some problems. An example is Amicus' District 9, combining Crowley and Otero Counties, which are relatively urbanized and diversified in their economic base, with Bent, Kiowa, Cheyenne and Kit Carson Counties, which are entirely rural and agricultural. As a result, La Junta, a railroad town with a strong labor union population (8,026) would be thrown in with (and submerged by) counties populated by ranchers and farmers. While Crowley and Otero counties had a fairly close balance between employment in manufacturing (15.1%) and in agriculture (16.3%) (Exhibit D, Part I, p. 32), the other counties employ over 30% of their working force in agriculture. (Exhibit D., Part II, p. 12) While Crowley and Otero Counties had a 1960 unemployment rate of 4 to 5%, the other counties in this district had a 1960 rate of around 1%. Again, as in Amicus' District 8, a senator would have a difficult time faithfully representing all the diverse interests of his constituents on welfare legislation, as well as on legislation relating to the competing interests of agriculture and manufacturing.

One of the most anomalous features of the Government's alternative apportionment is the allocation of 11 senators to Denver and of 9 senators to its four suburban counties of Jefferson, Adams, Arapahoe and Boulder. These suburbs are growing faster than any other area of the state (a fact of apparent concern to the Government when discussing the Colorado plan, Br. p. 44), and Denver County is relatively static. The 1960 population of the suburban counties was 435,496 and that of Denver 493,887, a ratio

approximating 9 to 10. The Colorado plan wisely balances these districts, giving consideration to the faster growth of the suburbs, 8 senators to 8, and thus provides for a balanced resolution of their annexation antagonisms. With the Government urging closer adherence to population factors, this overrepresentation of Denver vis-a-vis its suburbs is impossible to explain on any rational basis.

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